(2) Supreme Court, U.S.
FILED
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No. _____

In The
Supreme Court of the United States
October Term, 2004

DIANE SANK,

Petitioner,

v.

THE CITY UNIVERSITY OF NEW YORK, ET AL,

Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

APPENDIX A, pp. 1a-110a
TO PETITION FOR WRIT OF CERTIORARI

Diane Sank
Petitioner *Pro Se*
173 Charlotte Place
Englewood Cliffs, NJ 07632
(201) 569-7297

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United states Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 17th day of August two thousand and three [sic].

Present: ROSEMARY S. POOLER
ROBERT D. SACK
REENA RAGGI,
Circuit Judges

(stamp
UNITED STATES COURT OF APPEAL
FILED
AUG 17 2004
Roseann B MacKechnie, CLERK
SECOND CIRCUIT

03-7677-cv (L)
03-7678-cv (CON)

DIANE SANK,
Plaintiff-Appellant,

-v-

THE CITY UNIVERSITY OF NEW YORK; JOSEPH S. MURPHY; W. ANN REYNOLDS; JAMES P. MURPHEY; THE BOARD OF TRUSTEES OF THE CITY UNIVERSITY OF NEW YORK, *AS CONSTITUTED AS OF APRIL 1988*; PAUL P. BAARD, BLANCHE BERSTEIN, SYLVIA BLOOM, MARIA JOSEFA CANINO, LOUIS C. CENCI, ARMAND D'ANGELO, JUDAH GRIEBETZ, WILLIAM R. HOWARD, HAROLD M. JACOBS, FLERIDA NEGRON, ROBERT L. POLK, JOAQUIN RIVERA, J.D., MARGARET A. TITONE, SHIRLEY ULLMAN WEDEEN, BRENDA FARROW WHITE, AND "JOHN DOE" I THROUGH X, (*X BEING A NUMBER AS YET UNDETERMINED SAID NAME BEING FICTITIOUS AND PRESENTLY UNKNOWN*), AND "JANE DOE" I THROUGH X, (*X BEING A NUMBER AS YET UNDETERMINED SAID NAME BEING FICTITIOUS AND PRESENTLY UNKNOWN*); AND GLADYS CARION, MICHAEL J. DEL GUIDICE, EDITH B. EVERETT, STANLEY FINK, CHARLES E. INNIS, JEAN C. LAMARRE, SUSAN MOORE MOURNER, ABDULLAH MUHAMMAD, GREGORIO

[page 2]

MAYERS, ROBERT A. PICKENS, CALVIN O. PRESSLEY, RONALD QUARTIMON, THOMAS TAM, AND; THE BOARD OF TRUSTEES OF THE CITY UNIVERSITY OF NEW YORK, *AS CONSTITUTED AS OF C. JUNE AND C. SEPTEMBER 1989*; THE BOARD OF TRUSTEES OF THE CITY UNIVERSITY OF NEW YORK, *AS CONSTITUTED AS OF C. JUNE AND C. SEPTEMBER 1990*; THE BOARD OF TRUSTEES OF THE CITY UNIVERSITY OF NEW YORK, *AS CONSTITUTED*

AS OF APRIL 1991; THE BOARD OF TRUSTEES OF THE CITY UNIVERSITY OF NEW YORK, *AS CONSTITUTED AS OF APRIL 1992*; BEVERLY SOWANDE; THE CITY COLLEGE OF NEW YORK; BERNARD W. HARLESTON, ANTHONY F. RODRIGUEZ, JEFFREY J. ROSEN, CAROL LADERMAN, FREMONT E. BESNER, JUNE NASH, THE COMMISSION ON HUMAN RIGHTS OF THE CITY OF

NEW YORK, DENNIS DELEON, RANDOLPH ("RANDY") WILLS, ESQ., STEPHANIE ORTELEIVA, LIZBETH SCHALET,

Defendants-Appellees.

Appearing for Plaintiff-Appellant: DIANE SANK, pro se, Englewood Cliffs, NJ.

Counsel for Defendants- Appellees: ROBERT H. EASTON, State of New York Office of the Attorney General, New York, NY.

Appeal from the United States District Court for the Southern District of New York (Sweet, J.).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the District Court's order is AFFIRMED.

Plaintiff-appellant, appearing pro se, challenges numerous rulings by the district court York (Sweet, J.) in a case arising from her 1988 removal as chair of the anthropology department of the City College of New York ("CCNY"), and the 1989 dismantling of her laboratory. After nine separate opinions were issued and a six-day bench trial was held on Sank's Title VII claims, all of her claims were dismissed. We conclude that all of her arguments on appeal are without merit. We, however, discuss in brief some of her contentions.

Reviewing de novo the district court's May 24, 1995 order pursuant to Fed. R. P. 12(b)(6) dismissing Sank's section 1983 due process claim, see Posr v. Court Officer Shield No. 207, 180 F.3d 409, 413 (2d Cir. 1999), and drawing all inferences in Sank's favor, id., we conclude that, because these claims were premised on events occurring in 1988 and 1990 and Sank did not file suit until January 1994,

her claims were barred by the 3-year New York statute of limitation to file a 43 U.S.C. § 1983 complaint. See Owen v. Okure, 488 U.S. 235, 251 (1989); McKinney's C.P.L.R. § 214. Sank has asserted no reason that is sufficient to toll the statute of limitations.

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Reviewing de novo the district court's November 10, 1995 order pursuant to Fed. R. Civ. P. 12(b)(6) dismissing Sank's claims against the individual staff's attorney of the New York City Commission on Human Rights, we conclude that dismissal was appropriate because these defendants are absolutely immune from liability. When they issued a decision in Sank's case, there were acting completely within their prosecutorial capacity. See Rudow v. City of N.Y., 822 F.2d 324, 327-28 (2d Cir. 1987).

Reviewing de novo the district court's June 26, 1997 order dismissing Sank's remaining Title VII claims against the individual CUNY defendants, we conclude that dismissal was appropriate because "under Title VII individual supervisors are not subject to liability." Mandell v. County of Suffolk, 316 F.3d 368, 377 (2d Cir. 2003).

Reviewing de novo the district court's April 8, 2002 order granting summary judgment and dismissing Sank's contract claim against defendants CCNY and CUNY, see Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292, 300 (2d Cir. 2003), we conclude that, because CUNY and its colleges are an "arm of the state," CUNY and CCNY are immune from Sank's breach of contract claims pursuant to the Eleventh Amendment. See Clissuras v. City Univ. of N.Y., 359 F3d 79, 83 (2d Cir. 2004) (per curiam); U.S. CONST. Amend. XI.

Reviewing the district court's April 12, 2002 discovery order for abuse of discretion, see Independent Order of Foresters v. Donald Lufkin & Jenrette, Inc., 157 F.3d 933, 937 (2d Cir. 1998), we conclude that the district court acted well within its "wide discretion" when it deneid [sic] Sank's

request for personnel information concerning 700 individual employees of CUNY. In re Fitch, Inc., 330 F.3d 104, 108 (2d Cir. 2003), Sank had already received information regarding 297 individuals and did not sufficiently explain why the additional 700 names had not been included in her original discovery requests or demonstrate that further personnel disclosures were likely to produce evidence supportive of her claims. Under these circumstances, the district court could reasonably deny additional discovery as "unreasonabley [sic] cumulative or duplicative," as well as unduly burdensome relative to any likely benefit. Id.; FED. R. CIV. P. 26(b)(2).

Sank alleges that the district court committed several errors or acted improperly during the six-day bench trial, held between September 30 and October 7, 2002. We dispose of these contentions as follows: First, the district court acted well within its discretion pursuant to Fed. R. Evid. 403 in denying Sank's request to introduce evidence about a change in school policy regarding academic advising that had not been pleaded in her complaint. See Perry v. Ethan Allen, Inc., 115 F.3d 143, 150 (2d Cir. 1997). Second, although during the trial the court engaged in a short ex parte discussion with defense counsel regarding a procedural matter, because no decisions were made during this discussion, and the court immediately informed Sank when she returned that the conversation occurred and a record of the conversation was available, we conclude that this discussion did not affect the fairness of the trial and therefore does not warrant a reversal. See Robinson v. Cattaraugus County, 147 F.3d 153, 164-65 (2d Cir. 1998). Third, Sank's allegation that the district court was biased is not supported by the record. Instead, it is clear that the court afforded her every opportunity to fully prosecute her claims. Fourth, although the district court permitted her to call 22 of 41 proposed witnesses, Sank complains that her witness list at trial was unduly restricted. We conclude that the district [sic] did not abuse its discretion in so limiting the number of witnesses at trial. Fed. R. Civ. P. 403; cf. United States v.

Holmes, 44 F.3d 1150, 1157 (2d Cir. 1995) holding that, even in criminal cases where

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the defense right to present witnesses is constitutionally protected, a trial court has the discretion to limit the number of witnesses at trial in order to "to exclude irrelevant, repetitive, or cumulative evidence.").

Fifth, we conclude that the district court did not commit clear error in holding that Sank failed to prove that her removal as chair of her department or the moving of her laboratory to a different part of the college violated Title VII. Cosme v. Henderson, 287 F.3d 152, 159 (2d Cir. 2002). The evidence at trial showed that Sank was removed pursuant to a recommendation from an outside review committee and that her laboratory was dismantled and relocated due to a need for space in the academic building. The court did not commit clear error in finding that defendants had submitted a legitimate nondiscriminatory explanation for these actions and that Sank had failed to show that these explanations were pretextual.

Reviewing the district court's April 7, 2003 order dismissing Sank's other retaliation claims premised on actions occurring after 1991, we conclude that dismissal was appropriate because (1) insofar as these claims were premised on retaliatory acts that were not alleged in the complaint, the district court did not abuse its discretion in refusing to permit Sank to amend her complaint to include these claims because these claims were raised late in litigation and not until eight to eleven years after they occurred. See Goss v. Revlon, Inc., 548 F2d 405, 407 (2d 1976) (per curiam) (undue delay is an appropriate basis to deny a motion to amend the pleadings); (2) the remaining claims of retaliation were properly dismissed because Sank failed to make out a prima facie case that these acts were retaliatory employment actions or that defendants' explanation for these actions were pretextual.

We therefore AFFIRM.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk
By:
/s/ Lucille Carr

DECIDED: August 17, 2004
CITATION: *Sank v. City Univ. of N.Y.*, 03-7677-cv (L), 03-7678-cv (CON), LEXIS 17245 (2nd Cir. 8/17/2004)

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UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
DIANE SANK,

Plaintiff,

- against - 94 Civ. 0253 (RWS)

THE CITY UNIVERSITY OF NEW YORK, JOSEPH MURPHEY, et al., OPINION

Defendants.
----------X

APPEARANCES:

DIANE SANK
Plaintiff Pro Se
173 Charlotte Place
Englewood Cliffs, NJ 07632

HON. ELIOT SPITZER,
Attorney General of the State of New York,
Attorney for Defendants,
120 Broadway
New York, NY, 10271
By: STEVEN L. BANKS
Assistant Attorney General
Of Counsel

[page 1]

Sweet, D.J.,

Plaintiff pro se Diane Sank ("Sank") has moved (1) pursuant to Rule 52(b) of the Federal Rules of Civil Procedure

to amend the findings of fact and conclusions of law on October 7, 2002 after the close of a bench trial denying the relief sought by her on her complaint alleging a discrimination claim and pre- November 21, 1991 retaliation claims under Title VII of the Civil Rights Act of 1964 ("Title VII"), codified at 42 U.S.C. §§ 2000e et seq., and (2) pursuant to Local Rule 6.3 of the Southern District of New York ("Local Rule 6.3") for this Court to reconsider its opinion dated April 4, 2003 granting defendant City University of New York ("CUNY") summary judgment on Sank's remaining retaliation claims, which arose after November 21, 1991.

For the following reasons, those motions are denied.

Prior Proceedings

The parties and proceedings have been described in greater detail in Sank v. City University of New York, 219 F. Supp. 2d 497 (S.D.N.Y. 2002), familiarity with which is presumed.

Sank commenced this action almost a decade ago, on January 18, 1994, alleging, inter alia, that the president of the City College of New York ("CCNY"), Bernard Harleston ("Harleston"),

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had removed her as chairperson of the CCNY Anthropology Department (the "Department") in 1988 because of her gender, race, religion and age, and subsequently retaliated against her after she filed a charge of discrimination with the New York City Commission on Human Rights ("NYCCHR").

Following more than eight years of litigation and the dismissal of certain of Sank's claims, a six-day bench trial was held from September 30, 2002 to October 7, 2002, to resolve Sank's Title VII claims. The claims at issue at the bench trial were those remaining claims that were alleged to have

occurred prior to the effective date of the amended Civil Rights Act, November 21, 1991, and as to which Sank was not entitled to a jury trial. These claims were that CUNY: (1) discriminated against Sank on the basis of race and gender when Harleston removed her as Department chairperson; and (2) retaliated against Sank by removing her from her assigned laboratory space and by denying her request for a full-pay sabbatical leave. At the conclusion of testimony, it was held that Sank had failed to sustain her burden of establishing by a preponderance of the evidence a cause of action of discrimination in violation of Title VII. In addition, it was held that Sank had not established a prima facie case of retaliation in the taking of her laboratory space or denial of her leave application. Those claims were therefore dismissed.

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Sank moved on March 25, 2003 to amend the Court's findings of fact and conclusions of law. CUNY responded on May 29, 2003, and the motion was considered fully submitted on June 13, 2003.[1]

After the conclusion of the bench trial, Sank continued to have viable claims in the form of alleged acts of retaliation which had occurred after November 21, 1991, which had not been dealt with at the bench trial because such claims entitled Sank to a jury trial. Because Sank had not specified these claims until shortly prior to the bench trial and because CUNY therefore had not had an opportunity to seek summary judgment on such claims, CUNY was permitted to move against such claims. The defendants moved against the remaining claims on December 4, 2002, and the motion was considered fully submitted on March 19, 2003. By order dated April 4, 2003 (the "April 4 Order"), summary judgment was granted to CUNY, and Sank was denied permission to replead her complaint to include new retaliation claims.

On May 5, 2003, Sank moved for reconsideration of the April 4 Order. The motion was considered fully submitted on June

[1] According to Local Rule 6.1, Sank was required to submit reply affidavits within five business days of service of the opposition papers. In a letter dated June 5, 2003, Sank noted that she had received CUNY's opposition on May 31, 2003. Thus, although it had been ordered that the motion should be submitted on June 4, 2003, Sank had five business days after May 31, or until June 6, 2003, to submit her reply papers. Sank sought and obtained an extension to June 13, 2003.4, 2003.

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4, 2003, along with Sank's other motion to amend the findings of fact and conclusions of law.

Discussion

I. Standard of Review

Rule 6.3 is intended to "ensure the finality of decisions and to prevent the practice of a losing party examining a decision and then plugging the gaps of a lost motion with additional matters." Carolco Pictures, Inc. v. Sirota, 700 F. Supp. 169, 170 (S.D.N.Y. 1988) (citation omitted). The parties may not present new facts or theories at this stage. Ralph Oldsmobile Inc. v. General Motors Corp., 2001 U.S. Dist. LEXIS 421, 2001 WL 55729, at *2 (S.D.N.Y. Jan. 23, 2001) (striking affidavit that was filed in support of motion to reconsider without court's permission); Primavera Familienstifung v. Askin, 137 F. Supp. 2d 438, 442 (S.D.N.Y. 2001) (party may not "advance new facts, issues or arguments not previously presented to the Court") (quoting Morse/Diesel Inc. v. Fidelity & Deposit Co. of Md., 768 F. Supp. 115, 116 (S.D.N.Y. 1991). "To succeed on a motion for reargument, the moving party must demonstrate that the court overlooked the controlling decisions or factual matters that were placed before the court in the underlying motion." Lopez v. Comm'r of Soc. Sec., 2002 U.S. Dist. LEXIS 5091, *1-*2 (S.D.N.Y.

March 27, 2002) (quotations and citations omitted); see also Shrader v. CSX Transp., 70 F.3d 255, 257 (2d Cir. 1995) (motion for

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reargument "will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked -- matters, in other words, that might reasonably be expected to alter the conclusion reached by the court").

Rule 6.3 must be narrowly construed and strictly applied so as to avoid duplicative rulings on previously considered issues, and may not be employed as a substitute for appealing a final judgment. Lopez, 2002 U.S. Dist. LEXIS 5091, at *3; Shamis v. Ambassador Factors, 187 F.R.D. 148, 151 (S.D.N.Y. 1999). The decision to grant or deny the motion rests in the discretion of the district court. AT&T Corp. v. Community Network Servs. Inc., 2000 U.S. Dist. LEXIS 11894, 2000 WL 1174992, at *1 (S.D.N.Y. Aug. 18, 2000).

The standard governing consideration of a motion for an amendment of findings of fact under Rule 52(b)[2] is the same as for a motion for reconsideration under Local Civil Rule 6.3, as discussed above. 4200 Avenue K LLC v. Fishman, 2001 U.S. Dist. LEXIS 5938, at *2, No. 00 Civ. 8814 (S.D.N.Y. May 10, 2001) (applying Local Rule 6.3 standards). See also United States v. Local 1804-1, Int'l Longshoreman's Ass'n, 831 F. Supp. 167, 169 (S.D.N.Y. 1993) (Rule 52(b) can correct "manifest errors of law or fact," but cannot be used to "relitigate old issues, to advance new theories, or to secure a rehearing on the merits"); Bldg. Serv. 32B-J Pension

[2] Rule 52(b) provides that, upon motion, a court "may amend its findings -- or make additional findings -- and may amend the judgment accordingly."

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Fund v. Vanderveer Estates Holding, LLC, 2001 U.S. Dist. LEXIS 2453, at *4, No. 00 Civ. 364 (S.D.N.Y. March 13, 2001) (denying motion under Local Rule 6.3 and Rule 52(b) where movant sought to introduce new evidence).

In addressing the present motion, the Court is also mindful that the plaintiff is proceeding pro se and that her submissions should be held "'to less stringent standards than formal pleadings drafted by lawyers . . . .'" Hughes v. Rowe, 449 U.S. 5, 9, 101 S. Ct. 173, 176, 66 L. Ed. 2d 163 (1980) (per curiam) (quoting Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 595, 30 L. Ed. 2d 652 (1972)); see also Ferran v. Town of Nassau, 11 F.3d 21, 22 (2d Cir. 1993). Nevertheless, pro se status "'does not exempt a party from compliance with relevant rules of procedural and substantive law." Traguth v. Zuck, 710 F.2d 90, 95 (2d Cir. 1983) (quotations omitted).

II. Motion to Amend Findings of Fact and Conclusions of Law

Sank has submitted a 187-page brief in support of her motion to amend the findings of fact and conclusions of law with regard to both her discrimination and retaliation claims. About 100 pages into her brief in support of her motion to amend, Sank expresses her frustration as a pro se plaintiff in trying to prove motive and pretext. Pls.' Mem. at 100. It should be noted, however, that such frustrations are not limited to pro se plaintiffs, as both concepts -- and pretext in particular -- are

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difficult to prove. E.g., Vandewalker v. Quandt's Food Serv. Distribs. Inc., 934 F. Supp. 42, 46 (N.D.N.Y. 1996) ("discriminatory intent is notoriously difficult to prove"). Sank simply did not show that the legitimate non-discriminatory reasons proffered by CUNY were mere pretext, and she now fails to cite to any evidence that was presented or controlling

authorities that were overlooked that would result in a different outcome.

A. Discrimination Claims

Claims of discrimination under Title VII are analyzed under the three-part test announced in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). First, the plaintiff must establish a prima facie case of discrimination by showing that (1) she is a member of a protected class and (2) she suffered an adverse employment action (3) under circumstances that give rise to an inference of unlawful discrimination. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981); Weinstock v. Columbia Univ., 224 F.3d 33, 42 (2d Cir. 2000). Second, if the plaintiff successfully establishes a prima facie case of discrimination, the defendant may rebut that showing by articulating a legitimate, non-discriminatory reason for the employment action. Burdine, 450 U.S. at 254; Weinstock, 224 F.3d at 42. Finally, if the defendant articulates a non-discriminatory reason, the plaintiff must come forward with evidence that the defendant's articulated non-discriminatory reason is a mere pretext for actual discrimination.

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Weinstock, 224 F.3d at 42 ("The plaintiff must 'produce not simply some evidence but sufficient evidence to support a rational finding that the legitimate non-discriminatory reasons proffered by the [defendant] were false and that more likely than not [discrimination] was the real reason for the'" employment action (quotations and citations omitted; brackets in original)). Whether a judgment as a matter of law is appropriate depends upon a number of factors, including the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case. Reeves v.

Sanderson Plumbing Products, Inc., 530 U.S. 133, 148-49, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000).

Sank asserts that judgment should have been entered for her on the discrimination claim due to a number of factors. In particular, Sank argues that the Court erred in finding that (1) the Outside Review Committee ("ORC") Report (the "ORC Report") was a legitimate non-discriminatory reason, (2) that Harleston's recommendation that Jones be chairperson of the Department was ratified by the Department, and (3) that the ORC Report was not a mere pretext for discrimination.

In support of her argument, Sank outlines a number of points, which are not clearly delineated in her brief. At least twenty were able to be discerned upon review, which loosely fit into her overall objections to the Court's findings.

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With regard to the ORC Report, Sank points to the following: (1) Harleston failed to act upon any other recommendations in the ORC Report; (2) the problems noted in the ORC Report existed prior to Sank's taking office; (3) Harleston permitted an insider to be elected after Jones resigned after one year; (4) Harleston's record of minority appointments, and that such appointments were not a fulfillment of affirmative action guidelines; (5) Harleston's membership in a black fraternity, Sigma Pi Phi; (6) the lack of interviews of the two candidates, who were white and female, other than Jones; (7) Sank's discharge and the replacement by Jones occurred simultaneously; (8) the By-Law by which Harleston had authority to discharge Sank was used for the first and apparently only time by Harleston in this instance; (9) Harleston ignored a Faculty Senate Resolution to return Sank to the chairpersonship; (10) Harleston allowed members of the Department to serve on the search committee for a new chair after Jones resigned despite admonitions to the contrary in the ORC Report; (11) Harleston used the term "chairman," rather

than "chairperson," to refer to Sank; and (12) the issue of Jones' appointment was not put on the public calendar of the Board of Trustees meeting such that Sank could participate in discussions thereon.

Sank claims the purported Department ratification was suspect because (1) Harleston previously had threatened to disband the Department; (2) there was no discussion of the ORC Report; (3) Harleston merely asked if Jones were acceptable, rather than ask

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for a ratification; (4) Harleston supposedly reminded the single black professor in the Department of Harleston's support; and (5) Professor June Nash received a distinguished professorship two years after the vote in question. Sank also generally objects to the testimony of Harleston and Professor Owen Lynch ("Lynch"), a member of the ORC. Finally, Sank also challenges an evidentiary ruling excluding the testimony of members of the Board of Trustees. Each will be addressed in turn.

As a general comment, it should be noted that many times Sank does not support her claims with any citation to the record, either because she failed to fill in blanks of citations or because she failed to include any sort of citation whatsoever. The latter almost always constitute instances where Sank relies solely on speculation, opinion and argument. There is no doubt that Sank truly believes that she was discriminated against, and believes that the evidence should be construed in such a way as to support her beliefs. Unfortunately, Sank's belief alone is insufficient in light of the absence of evidence to support those beliefs and the evidence that contradicted it.

1. <u>The ORC Report</u>

The Court at trial already specifically considered four of the allegations above, and they were found insufficient to establish Sank's clam of race or gender discrimination under Title

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VII. These were: (1) Harleston's membership in Sigma Pi Phi, a black fraternity dedicated to promoting the interests of black males in education and business (Tr. at 821-22); (2) Harleston's use of the word "chairman" in the removal letter (Tr. at 504); (3) evidence of Harleston's efforts toward minority hiring (Tr. at 822); and (4) the election of Professor Besmer, a white male "insider" of the Department, as acting chairperson of the Department for the 1989-90 academic year by the Executive Committee after the departure of Del Jones.

Sank also misconstrues one finding by the Court related to Harleston's hiring practices. She claims that the Court found that Harleston would have inappropriately appointed black candidates who were not as qualified as non-black candidates. Instead, after hearing Harleston's testimony and observing his demeanor, it was found that Harleston recognized the importance of ethnic balance at a university in which four out of five students are minorities and that he engaged in an aggressive affirmative action program which was "entirely appropriate." There was no evidence presented that Harleston had ever appointed a less qualified black candidate, except that Sank has alleged that Jones, who was recommended by the ORC Report, was less qualified than two other professors who were recommended. In light of the fact that Jones was a nominee by the ORC, and in light of the fact that Sank has failed to discredit that report, Jones cannot be said to have been unqualified. Thus, the only finding with regard to Harleston's

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practices was a recognition that he aggressively attempted to hire qualified minority candidates.

In addition, Sank's accusation that the Outside Review Committee report (the "ORC Report") was without basis was also considered and rejected by the Court. Tr. at 824. This finding involves several of Sank's re-presented facts, including: (1) the problems noted in the ORC Report existed prior to Sank's taking office; and (2) the lack of interviews of the two candidates, who were white and female, other than Jones. As noted in the opinion, any factual inaccuracies or mistakes in the ORC Report are not the subject of this lawsuit. CUNY acted upon the ORC Report, and therefore, in the absence of any evidence that it did so with the knowledge that such report was a fabrication -- and no such evidence has been presented -- Sank's contentions are irrelevant.

Sank also contends that Harleston failed to implement certain of the recommendations of the ORC Report and, in fact, only implemented that portion concerning her replacement as Department chairperson. Harleston testified, however, that he was not directly responsible for the implementation of the other recommendations concerning, for instance, the Department's staffing, retention of the Department secretary, or its academic programs. Therefore, Harleston was not acting discriminatorily in not doing other officials' jobs.

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Sank also alleges that the ORC Report was a pretext because Harleston purportedly did not follow it as he permitted members of the Department to join the search committee for a new chair despite admonitions to the contrary. First, Sank does not support her contention with any evidence that Harleston was in fact in charge of selecting the search committee. Second, even if such evidence were presented, it may be explained by Harleston's testimony of his belief that a measure of "calm" had returned to the Department after Jones' appointment.

With regard to the ORC Report, Sank also counter-factually alleges that Harleston exerted influence over the members of the ORC to have them recommend her removal. Harleston and one of two members of the ORC, Professor Owen Lynch, testified that no discussion took place between Harleston and the ORC about Sank or her removal.

Sank's present contention that her discharge and the replacement by Jones occurred simultaneously was rejected by the Court after trial, and Sank has presented no evidence or controlling authority that was not considered at the time. Indeed, she merely reargues the point.

The issue of the Faculty Senate Resolution in support of Sank and the fact that Jones' appointment was apparently not put on

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the public Board of Trustees' calendar are simply irrelevant to the issue of Sank's discharge.

Finally, while it is interesting that the By-Law used to remove Sank was first (and apparently last) used by CUNY to remove Sank from her position, the other evidence outweighs this fact, particularly given the existence of the ORC Report and CUNY's demonstrated reliance on it.

2. <u>Department Ratification</u>

As a general matter, the issue of the Department's "ratification" of the ORC Report and of Jones is less relevant, given the finding that Sank's discharge was not simultaneous with Jones' appointment. In addition, Sank fails to establish on the record any of the following allegations, except that she refers to the transcript with regard to Harleston's threat but

ails to cite specific pages. Sank's arguments will nonetheless e addressed.

The fact that Harleston had threatened the Department with disbanding was well-known and failed to establish that the Department was not at least partially in accord with Harleston in light of the other evidence presented.

The allegation that there was no discussion of the ORC Report does not in itself establish that the vote was a sham and

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pretextual. No additional evidence with respect to the absence of discussion has been presented.

The allegation regarding Harleston's choice of diction is completely irrelevant. Harleston's purported asking whether Jones was acceptable was, in effect, a request for ratification of the Report.

The fourth argument, if proven, could provide evidence that Harleston was strong-arming the voting mechanisms of the Department. Such strong-arming -- which could also be called by its nicer alias, "politicking" -- nonetheless does not go to show that Sank was discharged because of Harleston's efforts to appoint Jones. As noted above, Sank has failed to present evidence or controlling authority that her discharge and the hiring of Jones were simultaneous acts.

Finally, no evidence was introduced to support the theory regarding Nash's vote and, in fact, Nash obtained the professorship two years after the vote in question. Such a time lag belies a connection between the two events. In the absence of any evidence that Nash's vote was related to Harleston's purported animus, this evidence also falls short.

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3. <u>Testimony of Harleston and Lynch</u>

Sank points out several instances where Harleston and Lynch were unable to recall, or misremembered, small details. Moreover, Sank spends a great many pages recounting her cross- examination of Harleston, and arguing that Harleston's forthright denials of her allegations must have greater meaning. Having heard the testimony about which Sank objects, and in light of the fact that the witnesses were testifying about events that occurred from 1987 to 1991 -- more than ten years prior to the time of their testimony -- such inconsistencies are not the smoking guns Sank would have them be and are insufficient to justify granting Sank's motion.

4. Evidentiary Objection

Finally, Sank in a footnote contends that she should have been permitted to call as witnesses members of the Board of Trustees. She fails to present any evidence or controlling authority in support of this point, nor has she established the relevance of such testimony. She did not provide a deposition, affidavit, or even an informal document that would provide the nature of such testimony. Presumably, such testimony would go to her complaint, above, that the issue of Jones' appointment was not on the public calendar. As noted above, this issue is not relevant

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to Sank's discharge given the finding that Sank's discharge was not simultaneous with Jones' appointment.

In sum, there is no dispute that the Department had experienced a great deal of turmoil at the time of Sank's removal. Further, the ORC report suggested, in response to such turmoil, that Sank be removed as chairperson. The fact that Sank was replaced by a black man, who had been suggested as one of three candidates by the ORC, is insufficient to win the day without any other indicia of

discrimination. Sank has failed to substantiate any of her beliefs about such discrimination with citations to evidence that was presented but was overlooked by the Court in making its findings of fact and conclusions of law. As a result, Sank's motion to amend the findings of facts and conclusions of law with regard to her discrimination claim is denied.

B. Retaliation Claims

Sank asks for amendment of the findings with respect to both retaliation claims: (1) the taking of her lab space, and (2) the denial of full-pay sabbatical leave.

A Title VII retaliation claim is analyzed under the rubric of McDonnell Douglas. Tomka v. Seiler Corp., 66 F.3d 1295, 1308 (2d Cir. 1995). First, in order to make out a prima facie case of retaliation, a plaintiff must establish that (1) she

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engaged in protected activity; (2) defendants were aware of the activity; (3) she was subjected to an adverse employment action; and (4) there is a causal connection between the protected activity and the adverse employment action. Gordon v. New York City Bd. of Ed., 232 F.3d 111, 116 (2d Cir. 2000); Quinn v. Green Tea Credit Corp., 159 F.3d 759, 768-69 (2d Cir. 1998). The Second Circuit has held that a close temporal relationship between the protected activity and an employer's adverse actions can be sufficient to establish causation. Treglia v. Town of Manlius, 313 F.3d 713, 720 (2d Cir. 2002) (citing Cifra v. General Elec. Co., 252 F.3d 205, 217 (2d Cir. 1998) ("The causal connection needed for proof of a retaliation claim can be establish indirectly by showing that the protected activity was closely followed in time by the adverse action.") (internal quotation marks omitted)). For mere temporal proximity to establish causality, the intervening period must be "very close." Clark Co. Sch. Dist. v. Breeden, 532 U.S. 268, 273, 149 L. Ed. 2d 509, 121 S. Ct. 1508 (2001).

If the plaintiff establishes a prima facie case of retaliation, the defendant may articulate a legitimate, non-retaliatory reason for its actions. Id. at 768. Finally, if the defendant does so, the plaintiff must prove that the proffered reason is merely a pretext for retaliation. Id. at 769.

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1. Lab Space

Sank begins by referring to inadmissible hearsay evidence that Harleston was "enraged" by the June 27, 1989 amendment to her charge that added a claim of race discrimination. Such evidence is inadmissible and cannot further Sank's cause, particularly given the lack of evidence connecting Harleston and the official who made the decision that resulted in Sank's removal from her laboratory, Anthony Rodriguez Pacheko ("Pacheko"),[3] a licensed architect who served as assistant vice-president for facilities and space planning at CUNY from January 1988 to May 1990.

Sank has challenged the truthfulness of Pacheko's testimony. As noted in the decision from the bench, however, Pacheko was an "entirely credible, forthright and direct" witness, based upon observation of his testimony. Pacheko, who was responsible for the master planning efforts at CCNY, testified that at the time he arranged for the taking of Sank's lab, he did not know Sank, nor was he aware of her claims of discrimination. Moreover, he testified that the change was made as part of a college-wide renovation, in which approximately one-fifth of the campus would be relocated over a four-year period. Finally, he credibly testified that he did not confer with Harleston regarding any decision he made with regard to allocation of space.

[3] Pacheko was known as "Anthony Rodriguez" during the relevant period.

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Sank claims that he is not credible because she has presented contradictory evidence, in which a member of the Computer Sciences Department does not remember asking for lab space to be connected by a door, but only remembers mentioning that such a situation could be useful. Having observed Pacheko's testimony, and given the passage of years, such evidence is insufficient to call his testimony into doubt.

Sank also notes that Pacheko had been forewarned that taking Sank's laboratory would cause problems. Such forewarning does not mean that he made the decision to injure Sank. Given the widespread nature of the reallocation of space that Pacheko oversaw, it is likely that problems would arise no matter what space was taken, and Pacheko would not have been fulfilling his obligations to CUNY had he taken any one person's potential unrest too seriously.

Further, Sank appears to assert that Pacheko's offer to Sank of an alternative lab space was some sort of buy-off. Pacheko's forthright testimony regarding this offer, however, establishes that he offered Sank the alternative lab space because she was upset, and Pacheko was trying to minimize any dislocation as best he could.

Sank also notes that Pacheko apparently failed to communicate with the Department about the decision to take her lab,

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while he also apparently communicated at great length with another department. Such claim is not adequately supported by the record and, in any case, is likely explained by Pacheko's belief that the lab was inactive. Sank also claims that Pacheko should not have thought that the lab was inactive, given the fact that he observed it during the summer session, but Pacheko's testimony that he truly believed the lab was inactive was persuasive.

All of these complaints also must be considered with the understanding that the events complained of took place approximately thirteen years prior to the testimony at trial.

Finally, Sank questions why Pacheko took vacation in July 1989, during which time the move occurred. Sank does not present any evidence that Pacheko normally did not take vacation during July (a time period when Sank admits many professors are not required to be at work) or that he purposefully took vacation to thwart her efforts to retain her laboratory space.

As a result, even if Sank proved her prima facie case which she has not, given Pacheko's lack of knowledge of the discrimination charge, she certainly failed to prove that the proffered reason for the moving of her laboratory -- the campus- wide renovations -- was a pretext. Nor has she presented any evidence that was presented at trial that would result in a

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contrary determination. Her motion on this ground is therefore denied.

2. Leave Time

Sank argues that the timing of the denial of her leave application and the participation by phone of members of the Department's Executive Committee during the consideration thereof should have been sufficient to suggest a retaliatory pretext. It was held, however, that even considering the college's process in review of her sabbatical application, Sank had failed to establish a prima facie case of retaliation. Moreover, she has not presented any evidence on the record that was not considered that would result in a different finding. As a result, her motion on this ground is also denied.

III. Motion for Reconsideration of the April 4 Order

It should be noted at the outset that Sank has asserted that her motion for reconsideration of the April 4 Order is motivated by her concerns with the description of her lawsuit "as a vehicle to litigate grievances by a tenured professor at war with the administration of her college." April 4 Order, at 37. Sank is upset, in particular, at the use of the term, "at war," and asks that the phrase be stricken from the opinion.

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According to Black's Law Dictionary, "war" is not only a "hostile conflict by means of armed forces, carried on between nations, states or rulers, or sometimes between parties within the same nation or state." Black's Law Dictionary 1576 (7th ed. 1999) Instead, alternative definitions include: "(2) [a] dispute or competition between adversaries," and "(3) a struggle to solve a pervasive problem." Id. at 1577. The second definition is the one at work here, and one specifically chosen with the knowledge of almost a decade of observing the workings of this case and the parties involved. Sank is unhappy with the administration over a number of issues that are not legally cognizable, but about which she has commenced many a successful complaint within the college's grievance system. The point of that sentence was that the proper place for Sank's complaints was in the grievance system, where she was successful, and not in the legal system where her complaints, albeit potentially valid, are not the sort that Title VII, as interpreted by the courts, was designed to prevent, correct or compensate for. The opinion did not in any manner state that Sank acted in an "unprofessional or ungentlewomanly manner," Pls.' Mem. at 3, and to construe otherwise gives a hint at the sort of misunderstandings that could have led Sank to vigorously pursue this lawsuit in the first place.

Sank also takes issue with several of the particular findings in the opinion.

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A. <u>Denial of Academic Advising Post</u>

Sank contends that CUNY provided adjunct professors for professors who received release time for research at the same time that CUNY claimed that it could not provide an adjunct for professors who sought release time for Academic Advising. As a result, she claims that she has proven that CUNY's denial of her request for release time for time spent working in Academic Advising was a pretext. First, Sank is comparing apples and oranges. How CUNY dealt with release time for professors who sought to undertake research is not at issue, as Sank does not complain (at least in this particular allegation) that she did not receive release time for research. The only issue is how CUNY dealt with other professors involved in Academic Advising. It is undisputed that CUNY was suffering from monetary woes, and that one means of cutting corners was by reducing release time for all professors in Academic Advising. Sank was not the only professor affected by the change. Moreover, Sank presented no evidence, and continues to present no evidence, that the decision-makers who determined that Academic Advising would no longer receive the same amount of release time did so as a result of her protected actions, and that the reasons given by the administration for making the change were a pretext for retaliating against Sank.

Sank also raises the issue of Bessmer's truthfulness, stating that his purported loyalty to Harleston rendered his

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affidavit untrustworthy. Sank has presented no admissible evidence to support such a finding, and she did not present any evidence of any such questionable truthfulness at the time of

the original motion either. It was already held, in any case, that CCNY's financial difficulties in 1992-93 caused a reduction in available release time for all faculty, and was a legitimate, non- discriminatory reason for Sank's course assignments in Spring 1993.

As a result, Sank has not met her burden pursuant to Local Rule 6.3, and her motion on this ground is denied.

B. Error in Spring 2001 Course Catalog

Similar to Sank's efforts to question the affidavit of Bessmer, she now challenges the truthfulness of the affidavit of Deputy Provost Barba by repeating the same facts that were put forward in her opposition papers and which were deemed insufficient to raise a material issue of fact.

Barba claims that he learned of the error in May and corrected it in May. A computer print-out reveals that the error was corrected on May 8, 2001. In response to this, Sank only provided her recollection that she contacted Barba later. Sank complained about the incident in May, however, and Barba noted that he learned of the error regarding Sank's classes, not that he necessarily learned of the error from her. Sank provided no other

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admissible evidence to challenge the notion that Barba acted in a manner inconsistent with a university official performing his job as he always does.

Sank now challenges the finding that the correction was made on May 8, 2001, by claiming that such changes can be post-dated on the SIMS computer system, and that therefore the exhibit dated May 8, 2001 was post-dated. She has also offered to provide an affidavit of another university official in support of her claims. Sank should have proffered

such facts at the time of the original motion. New evidence may not be presented on a motion for reconsideration.

In short, Sank has merely re-presented evidence that was already rejected and reargued her opposition to the motion that was already denied. In addition, she has attempted to present new evidence. Such efforts are not appropriate on a Rule 6.3 motion and must result in the denial of Sank's motion.

C. Other Issues

Sank also asserts that the April 4 Order should have permitted her to amend her complaint to allege an additional twenty-three (or more) allegations of retaliation.

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Rule 15(a) provides that the district court should freely grant leave to amend the pleadings. Fed. R. Civ. P. 15(a). The amendment should be permitted absent evidence of circumstances such as undue delay or bad faith, undue prejudice to the opposing party or futility. Foman v. Davis, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962); see also Jones v. New York State Div. of Military and Naval Affairs, 166 F.3d 45, 50 (2d Cir. 1999) (affirming district court's denial of leave to amend due to futility of amendment). It was held that the amendments should not be allowed due to evidence of undue delay and futility. April 4 Order, at 26.

Sank merely summarizes each of her allegations, without any argument as to evidence that was presented and not considered, or controlling authorities that were ignored. Given the lengthy nature of this list and the fact that Sank has failed to comply with Rule 6.3, the allegations will not be addressed separately. In any case, Sank has again failed to demonstrate that undue delay was not present when she specified for the first time twenty-three (or more) allegations

of retaliation after a bench trial had been held on the pre-November 21, 1991 events that formed the nucleus of her complaint, almost ten years after commencing this lawsuit and after CUNY had already moved twice in summary judgment against claims. Moreover, she has failed to demonstrate that such amendments would not be futile.

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Sank does point to one specific allegation of retaliation which she claims was "never resolved" in the opinion, as well as generally points to approximately 230 pages of her declaration that was submitted in opposition to the motion. The latter will not be specifically addressed as the approximately 230 pages of her declaration were examined by this Court in determining the earlier opinion, even though the strictures of Local Rule 56.1 did not mandate that such review be made as Sank had not included any of these additional incidents in her Local Rule 56.1 statement. Because the review of the 230 pages revealed that Sank had duplicated certain specific incidents that were discussed, and on many occasions failed to provide evidentiary support for allegations or alleged actions that clearly were not adverse actions, the incidents on the 230 pages that were not specifically discussed in Sank's papers[4] were not specifically discussed in the April 4 Order and will not be discussed now. Moreover, as with all the other allegations, Sank has failed to overcome the hurdle of undue delay and futility.

The specific claim involved an alleged incident where Barba "vocally admonished and embarrassed" Sank at a Faculty Senate Meeting by accusing her of changing the date of her final exam and by his failing to apologize afterward. Again, Sank fails to

[4] Sank did not allege any of her alleged incidents in her Rule 56.1 statement. Instead, it was left to the Court to peruse an exhibit attached to her opposition memorandum in order to compile the list that was referred to in the opinion.

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overcome the hurdle of undue delay and futility. The event in question occurred on May 17, 2001. Sank waited almost two years to specify that she considered it an act of retaliation as a result of Sank's protected actions. With regard to futility, it is not necessary to proceed beyond the first prong of the McDonnell Douglas rubric discussed above. Tomka, 66 F.3d at 1308. Sank has utterly failed to present evidence that her "embarrassment" in front of a select group of faculty and students amounted to an "adverse employment action." Gordon, 232 F.3d at 116; Quinn, 159 F.3d at 768-69. There is no indication that this public chastisement resulted in Sank's being disciplined, in Sank's receiving fewer students, in Sank's demotion, in Sank's loss of pay, or in Sank's loss of any job or position. Further, Sank has failed to present evidence that Barba's comments were causally related to Sank's protected activities.

This Court has said before that Professor Sank is a courageous, determined person. Such courage and determination, however, are likely not the best way to win friends and influence people. A lot of Sank's complaints stem from what potentially are reactions (but not adverse actions) to Sank's willingness to fight for what she believes in and to stand up for herself. Because Sank has failed to establish that arguably negative reactions to these attributes are in fact legally cognizable adverse employment actions, this Court has no choice but to dismiss this case and can only compliment Sank on her fortitude.

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Conclusion

For the foregoing reasons, Sank's motion to amend the factual findings and conclusions of law is denied, and her motion for reconsideration of the April 4 Order is denied.

Submit judgment on notice.

It is so ordered.

New York, NY
June 19, 2003

/s/ Robert W. Sweet
ROBERT W. SWEET
U.S.D.J.

DECIDED: June 19, 2003
CITATION: *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), LEXIS 10396 (S.D.N.Y. 6/19/2003)

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UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

DIANE SANK,

Plaintiff,

94 CIV 0235 (RWS)

- against -

JUDGMENT

THE CITY UNIVERSITY OF NEW YORK, JOSEPH MURPHEY, et al.,

Defendants.

----------X

Defendants having moved for summary judgment pursuant to Fed. R. Civ. P. 56 to dismiss the remaining claims in the complaint; plaintiff's opposition having been treated as a motion to amend, and the matter having come before the Honorable Robert W. Sweet, United States District Judge, and the Court, on April 4, 2003, having rendered its Opinion (88325) denying plaintiff's motion to amend, granting

defendants' motion to dismiss, and dismissing the remaining claims, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons in the Court's Opinion (88325) dated April 4, 2003, plaintiff's motion to amend is denied; defendants' motion to dismiss is granted, and the remaining claims are dismissed.

Dated: New York, New York
April 8, 2003

/stamped/ J. MICHAEL McMAHON
Clerk of the Court

BY:

/initialed/
Deputy Clerk

DECIDED: April 8. 2003

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
DIANE SANK,

Plaintiff,

- against - 94 Civ. 0253 (RWS)

THE CITY UNIVERSITY OF NEW YORK, JOSEPH MURPHEY, et al., OPINION

Defendants.
----------X

APPEARANCES:

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HON. ELIOT SPITZER,
Attorney General of the State of New York,
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120 Broadway
New York, NY, 10271
By: STEVEN L. BANKS
Assistant Attorney General
Of Counsel

[page 1]

Sweet, D.J.,

Defendants City University of New York ("CUNY") and City College of the City of New York ("CCNY") (collectively the "Defendants") have moved pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule

56.1 to dismiss the remaining claims in the complaint of plaintiff pro se Diane Sank ("Sank"). Sank's only remaining claims, for which she has requested a jury trial, are filed pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), codified at 42 U.S.C. §§ 2000e et seq., alleging certain acts of retaliation taken against Sank after she filed a complaint of discrimination with the New York City Human Rights Commission and occurring after November 21, 1991, the effective date of the 1991 amendment to the Civil Rights Act.[1] In addition, Sank's opposition will be treated, in part, as a motion pursuant to Rule 15(a) of the Federal Rules of Civil Procedure to amend her complaint to include approximately twenty-three additional acts of purported retaliation that occurred from late November 1991 to March 1995.

[1] A bench trial has already been held on Sank's claims arising prior to November 21, 1991. Permission was granted at the close of the bench trial for the Defendants to file the instant motion because Sank did not specifically raise the claims that are the subject of the instant motion until May 2002, well after the Defendants had moved for summary judgment for the first time. Before putting the judiciary and the parties to the expense of the jury trial, it was determined that the claims should first be tested in a summary judgment motion if the Defendants so chose.

[page 2]

For the following reasons, Sank's motion to amend is denied, and the Defendants' motion is granted. As a result, all of Sank's remaining claims are dismissed.

Prior Proceedings

On October 21, 1988, Sank filed a charge of discrimination, numbered "EM00457-8/24/88-DE" with the New York City Commission on Human Rights ("NYCCHR"), alleging that Bernard Harleston ("Harleston"), President of the City College of the City University of New York ("CCNY"), removed Sank as chairperson of the Anthropology Department on April 27, 1988 because of gender discrimination. Sank, a white female, has been employed as a full professor of anthropology at CCNY since 1968.

Sank amended her charge on June 27, 1989, to add a claim that her removal as chairperson was a result of racial discrimination.

On August 8, 1989, Sank filed a second amended charge with the NYCCHR alleging that CCNY had retaliated against her for her charge of discrimination by (1) denying her request for sabbatical leave and (2) removing the contents of her research laboratory without proper notice to her.

[page 3]

Sank filed a third amended charge on March 3, 1990, alleging that the chairperson of the Anthropology Department had threatened, in September 1989, to remove her research computer in retaliation for her charge of discrimination.

The NYCCHR issued a seventeen-page Determination and Order After Investigation on January 22, 1993. The determination concluded that there was no probable cause to believe that CUNY or its employees had engaged in the unlawful discriminatory and retaliatory conduct alleged in Sank's charge.[2] The Equal Employment Opportunity Commission adopted the conclusions of the NYCCHR and issued Sank a Right-to-Sue letter on October 19, 1993.

Sank filed her complaint in this Court on January 18, 1994, and an amended complaint (the "Complaint") was filed on May 27, 1994. After several iterations of motion practice, Sank's complaint was winnowed down to certain claims of discrimination and retaliation in violation of Title VII. See Sank v. City University of New York, 219 F. Supp.2d 497 (S.D.N.Y. 2002). For those actions

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[2] Sank claims that a determination of "probable cause" was found but fails to point to any such determination in her exhibits. The determination attached as an exhibit to the Defendants' declaration states that no probable cause was found. See Determination of January 23, 1993 at 1 ("After investigation, the Law Enforcement Bureau ("Bureau") of the Commission has determined that there is no probable cause to believe that respondents engaged in the unlawful discriminatory practices charged in the complaint

and amended complaints."); id. at 11 ("[N]o evidence was uncovered to support [Sank]'s allegation that she was removed as chairperson of the Anthropology Department because her sex, race and color."); id. at 12-16 (discussing and finding no evidence to support Sank's claims of retaliation).

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alleged to have occurred prior to November 21, 1991, the effective date of the 1991 amendment to the Civil Rights Act providing the right to a jury trial for Title VII plaintiffs, a six-day bench trial was held. At the conclusion of the trial on October 7, 2002, an opinion was issued from the bench, concluding that there was insufficient evidence to support Sank's discrimination and retaliation claims arising from her removal as department chairperson, the relocation of her laboratory, and the denial of her request for sabbatical leave. Sank has filed a motion to reconsider these findings, which is presently returnable on April 16, 2003.

Thus, the only remaining claims in this action are Sank's allegations of retaliatory actions occurring after November 21, 1991, and for which she is entitled a jury trial. Two specific claims were made part of this action through a motion for reconsideration Sank filed in May 2002. Sank v. CUNY, 94 Civ. 253, 2002 U.S. Dist. LEXIS 14032, at *17-18 (S.D.N.Y. July 31, 2002). In her motion for reconsideration, for the first time Sank specifically alleged that CUNY retaliated against her by (1) denying her request to participate in Academic Advising in lieu of teaching a course in the Spring 1993 semester, and (2) failing to correct an error in the CCNY Fall 2001 Schedule or Classes that listed prerequisites for the course that were not, in fact, required.[3] In her instant

[3] Related to this claim is Sank's assertion that the mis-described class was precipitously cancelled due to under-enrollment in August 2001.

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papers, Sank has submitted an additional twenty or so allegations of retaliatory conduct, which shall be discussed, infra.

The Defendants filed the instant motion on December 4, 2002, and Sank responded on February 5, 2003. The Defendants submitted their reply on March 19, 2003, at which time the motion was considered fully submitted.

Facts

As befits a summary judgment motion, the following facts are drawn from the parties' Rule 56.1 statements. It should be noted that Sank, who received prior notice that she would be required to reply to CUNY's Rule 56.1 statement, failed to supply adequate evidentiary support for most of her assertions in her Rule 56.1 statement in response to the Defendants' Rule 56.1 statement. Where Sank did not provide a specific reference to an exhibit or other piece of admissible evidence, her assertions were discounted, except where her assertions could be supported by the documents relied upon by the Defendants in the paragraphs with which Sank took issue. E.g., Millus v. D'Angelo, 224 F.3d 137, 138 (2d Cir. 2000) (per curiam) (affirming summary judgment where plaintiff failed to deny key allegations in defendant's Local Rule 56.1 statement). Because Sank was served with proper notice of the local rule, consisting of a separate, two-page notice, her pro se status does not insulate her from this result. E.g., Champion v.

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Artuz, 76 F.3d 483, 486 (2d Cir. 1996) (affirming summary judgment against pro se plaintiff who was provided with notice of Local Rule 56.1 requirements, but nonetheless failed to comply with rule).

Sank's Course Assignments in Spring 1993

At a meeting of the Anthropology Department on September 17, 1992, Professor Fremont Besmer ("Besmer") was elected to serve as acting chairperson. An election was necessary because Professor Carol Laderman ("Laderman"), the sitting department chairperson, was unable to perform the duties of the office following a stroke in August 1992.

As acting chairperson, Besmer was responsible for preparing the Spring 1993 teaching schedules for faculty in the Anthropology Department. In conjunction with that responsibility, he received a memorandum from Sank dated September 24, 1992, in which Sank requested that she be assigned in the Spring 1993 to teach two courses, ANTH 290 D and ANTH 101 E. In addition, she asked that she be assigned to Academic Advising or, if she could not get that assignment, that she be assigned to ANTH 101 F.[4]

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[4] Sank claims without citing any evidentiary support that up until the Spring of 1993, she received an assignment to Academic Advising as a pro forma matter. It is true that in the October 2, 1992 memorandum authored by Sank and cited by the Defendants, Sank claims to have been a part of the program for "10+ years." The Court will accept the fact that Sank had formerly received the assignment for more than ten years as an uncontested fact, but not the fact that she had received that position as a matter of course for all of that time. For the basis of this motion only, however, such inference can be drawn from that fact that she had consistently received the assignment for more than ten years.

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Prior to this time, Sank had consistently received an Academic Advising assignment for more than ten years.

Academic Advising is an academic support program in which faculty members at CCNY can participate with the approval of their department chairperson, on the condition that their participation does not interfere with their primary responsibility to teach. Until the 1992-93 academic year, faculty members participating in Academic Advising received credit towards their teaching obligation for each semester that they participated in the program. In the 1992-93 academic year, because of a financial exigency, CCNY reduced by half the credit granted for participation in Academic Advising, i.e., a faculty member would have to participate in Academic Advising for two semesters in a single academic year to receive a one-course reduction in his or her obligation. This change in policy affected all faculty in all academic departments.[5]

In a memorandum to Besmer dated October 2, 1992, Sank reiterated her request to be assigned to ANTH 290 D, ANTH 101 E and

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[5] Sank does not contest this assertion, but does allege that only two or three faculty were involved in Academic Advising and thus Sank, as one of them, bore the brunt of the change in policy. Sank does not provide any evidentiary support for this assertion, which, in any case, does not present a genuine issue of fact with regard to whether the change affected all professors in the program instead of only Sank.

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to Academic Advising, or, if Academic Advising were unavailable, to be assigned to ANTH 101 F as her third course.

Besmer scheduled Sank to teach ANTH 290 D, ANTH 101 E and ANTH 101 F in the Spring Semester. The Defendants claim that Besmer could not approve Sank's request to participate in Academic Advising in lieu of teaching ANTH 101 F because (1) there was insufficient funding to hire adjunct faculty to cover ANTH 101 F, and (2) CCNY's change in policy reducing available release time for faculty members who participated in Academic Advising meant that Sank would have had to teach a third course regardless of whether or not she participated in Academic Advising. Sank states that she was unaware of the change of policy at that time.[6]

The Defendants allege that Sank's discrimination charges with the NYCCHR and her grievance challenging Besmer's election as acting chairperson did not affect the teaching schedule Sank received for the Spring 1993 semester.[7]

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[6] Sank also questions the timing of the administration's budget short fall and decision to change the Academic Advising policy. Sank has not supported her speculations with any evidence and as such has failed to raise a genuine issue of fact in this regard.

In response, Sank points to her "replies" to declarations of two witnesses or the defendants: Besmer and Ilona Anderson ("Anderson"), the former CCNY Dean for Faculty Relations. She does not point to any specific ebuttal in these replies, which are primarily based on speculation and vithout any evidentiary support. A review of these replies does not reveal vhat material issue of fact Sank was trying to raise, except perhaps to ssert that Besmer was aware of Sank's actions at the time he made the ecision regarding her course load. Whether such fact, if true, would uggest retaliation is a matter of law, which as discussed later, is nsufficient to avoid summary judgment on the issue of pretext.

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In January 1993, at the start of the Spring 1993 emester, Laderman resumed her duties as chairperson of the Anthropology Department. Laderman approved Sank's equest to participate in Academic Advising in the Spring 1993 semester. In a letter dated February 11, 1993, Ilona Anderson, then the CCNY Dean for Faculty Relations ("Anderson"), notified Sank that she was not entitled to additional release time for her participation in the advising program.

In a letter dated March 1, 1993, Sank told Anderson that her assignment to Academic Advising for Spring 1993 had resulted in a contractual overload, i.e., an assignment to more than 21 credit hours in a single academic year. On March 29, 1993, Sank filed a formal grievance alleging a contractual overload and requesting "[p]ayment for excess workload."

On April 16, 1993, Anderson met with Sank, Laderman and Sank's union representative, Professor Al Bachman. At that meeting, Sank agreed to resign from Academic Advising and withdraw her grievance in exchange for additional compensation for the fifteen hours she had worked in Academic Advising in Spring 1993.[8]

[8] Sank disputes this fact by referring generally to her "reply" to Anderson's declaration. A review of that document, which as discussed above is largely based on personal knowledge or speculation without any evidentiary support, does not reveal the basis of her dispute.

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During the discussions to resolve Sank's grievance, her previous charges of discrimination were not mentioned or otherwise discussed.[9] Anderson did not consider Sank's discrimination claims in working to resolve Sank's grievance.

As part of an agreement to resolve Sank's grievance, she received additional compensation for the time she worked in Academic Advising in Spring 1993.

The Error in the Fall 2001 Schedule of Classes

The Provost's Office at CCNY is responsible for preparing and publishing class schedules and course catalogs for use by the college community. The process involved in preparing a schedule of classes takes several months to complete and requires the participation of the Registrar's office, deans and department chairpersons.

The Provost's office requests from the deans a schedule of classes to be offered by their respective divisions in the following semester. In turn, the deans request from each chairperson a schedule of classes to be taught by his or her academic department. In response, the department chairpersons develop preliminary class schedules, identifying which courses will be

[9] Sank's union contract did not permit faculty to assert grievances based on discrimination claims filed outside of the CUNY process.

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taught, the number of sections to be taught, meeting time and assigned faculty. The preliminary class schedules do not list prerequisites.

The Provost's office transmits the class schedules received from the academic departments to the Registrar's office, which codes the schedule into the Student Information Management System ("SIMS") and prepares a revised schedule of classes for the entire college. The revised schedule

lists for each course any prerequisites or co-requisites obtained from the SIMS database maintained by the Registrar's office. The revised schedule of classes is intended to, as much as possible, match the final schedule of classes supplied to students.

When completed, the Provost's office sends a copy of the schedule of classes to the deans and departmental chairpersons for their review and approval. Thereafter, the Registrar's office makes final corrections to the schedule of classes, which is then submitted to a commercial printer to be published in booklet format. After the final schedule of classes is printed and delivered to campus, it is distributed to students prior to the start of registration.

Mistakes are discovered every year in the printed schedule of classes following its publication and distribution. When an error is reported and verified by the Provost's office in

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a printed schedule of classes, a correction is made in the SIMS database maintained by the Registrar's office, a correction is posted in the Registrar's office, and the schedule of classes posted on the college website is updated to include the correct information. Given the frequency of errors in the printed schedule of classes, students are generally aware that the schedule of classes may be updated and corrected after its publication, and that they should check with the Registrar's office or the college website for the latest course information.[10]

For the Fall 2001 Schedule of Classes, the revised schedule of classes was sent to deans and departmental chairpersons in March 2001[11] and sent to the printer in April 2001.

In May 2001, it was brought to the attention of Deputy Provost Joseph Barba ("Barba") that the Fall 2001 Schedule of

Classes erroneously listed a mathematics prerequisite for one of

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[10] Sank speculates that students were not aware that they should look to these sources for potential errors. She fails to provide specific, admissible evidentiary support for this belief.

[11] Sank contests that this procedure could not have been followed in the spring of 2001 based on her belief that if her departmental chair had received the draft, the mistake would have been corrected. Such supposition is insufficient to raise a genuine issue of material fact. She also recites the hearsay statement from her chairperson, who denied having received the list. The hearsay statement is not admissible and cannot raise a genuine issue of fact.

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Sank's courses, ANTH 29500.[12] The Course Catalog listed the following comments under ANTH 29500:

> PREREQ: Math 10100 or MATH 10700 or MATH 10500 CREDIT NOT GIVEN FOR BOTH ECO 29500 AND MATH 17300

Barba verified the error and determined that the mathematics prerequisite for ECO 29500, an economics course, had erroneously been listed under ANTH 29500.[13] The Defendants hypothesize that the erroneous listing occurred due to an input error by temporary clerical staff in Spring 2000 when CCNY was upgrading the SIMS database. In Fall 2000 and Spring 2001, numerous courses in the SIMS database were discovered to have erroneously listed prerequisites. The input error for ANTH 29500 was not discovered prior to the printing of the Fall 2001 course catalog because that was the first semester that the course had been offered following the upgrade.

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[12] The Defendants claim that Sank contacted Barba directly; Sank claims she did not know that Barba was the person in charge of overseeing such changes and so would not know to contact him. The fact that changes were made in May 2001, however, shows that Barba was contacted in some manner, even if not by Sank directly. Therefore, the fact that Sank did not

know Barba was in charge of the correction process does not raise a genuine issue of fact as to whether he was contacted in May 2001

[13] Sank again speculatively posits why such mistake could not have been made, including the fact that the Economics courses are listed many categories away from the Anthology courses and the fact that the Economics courses should be listed by numbers without two zeros on the end, i.e., ECO 295, and so the mistake should not have been made. These speculations are only that and are insufficient to raise a genuine issue of fact.

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Barba then directed Virginia Barberesi in the Registrar's office to remove the mathematics prerequisite from the course in the SIMS database so that students would be permitted to register for ANTH 29500. In addition, he had CCNY's website updated so that ANTH 29500 was correctly described as having no prerequisites. A correction was also posted in the Registrar's office. This procedure was completed by May 8, 2001,[14] before the start of registration on May 14, 2001. Registration for the fall semester continued through the end of August 2001.

At the time Barba dealt with the error, he had no knowledge of Sank's charges of discrimination or the existence of this litigation.[15] His response was identical to his response to

[14] The document on which the Defendants rely to show that the change was made reveals that the prerequisite of taking one of three mathematics courses was deleted from the listing. Sank claims that the administration failed to delete all the prerequisites and that some remained in place after this action. She does not provide any evidentiary support for this assertion and therefore does not establish a genuine issue of material fact in this regard. Indeed, the page from the course catalog that she includes as an exhibit vitiates her argument: the catalog lists as a prerequisite that a student have taken one of three mathematics courses (the three that were deleted on May 8, 2001 according to the administration's printout) and then states that a student who has taken MATH 17300 cannot get credit for taking ECO 29500, or vice versa. That statement does not establish a prerequisite but states a condition of taking ECO 29500, that one may not also get credit for MATH 17300. The

latter line supports Barba's conclusion that the prerequisites for ECO 29500 were mistakenly appended to ANTH 29500.

[15] Sank states that she "doubts" that Barba had no knowledge of her complaints because as an administrator, he should have been privy to the knowledge. Such speculation in the absence of any evidentiary support does not create a genuine issue of material fact.

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other complaints of erroneously listed prerequisites in the schedule of classes.

By letter dated May 23, 2001 (after the problem was corrected), Sank informed CCNY President Stanford A. Roman Jr. of the error in the printed catalog and asked for a complete investigation thereof. On September 4, 2001, she filed a grievance related to the error, in addition to other concerns.

CCNY requires elective courses, such as ANTH 29500, to have a minimum enrollment of ten students. ANTH 29500 was cancelled for the Fall 2001 semester on August 22, 2001, one day prior to the close of regular registration, at which time the class had three students enrolled. On August 22, 2001, two other anthropology courses -- ANTH 24600 and ANTH 24900 -- had enrollments of seven and five students, respectively. The Dean of Social Sciences, in consultation with the Anthropology Department chairperson, decided to permit these courses to remain open in anticipation that they would enroll a minimum of ten students.

By the end of late registration on August 30, 2001, ANTH 24600 had eleven students registered and ANTH 24900 had nine students registered. Subsequently, in September 2001, two additional students registered in ANTH 24900, bringing its total enrollment to eleven students.

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Sank's salary was unaffected by the cancellation of ANTH 29500. Sank contends that she was adversely affected, however, because (1) she was told four days before the fall

semester that the class was cancelled, so that she had already substantially completed her preparation for the class; (2) she was forced to teach an additional class that was outside the field of Anthropology and that she had never before taught in order to make up for the cancelled class in the Spring 2002; (3) the fact of cancellation was put in her folder as an "adverse/negative" teaching record; and (4) the cancellation was disincentive for students to enroll in ANTH 29500 when next it was offered.

Sank's Other Allegations of Retaliatory Conduct

For the first time in her opposition papers, Sank has specified a series of actions that she claims were retaliatory and that occurred after November 21, 1991. These allegations were not part of her Rule 56.1 statement.[16] In light of the length and breadth of these charges, they will be summarized below as they appear in an exhibit to Sank's opposition papers. It should also be noted that the "date" of the action is often times demarcated by the date on which Sank responded to the alleged adverse action, such as by writing letters or filing grievances.

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[16] Sank did refer to specific exhibits to provide an evidentiary basis for her claims. The organization of the exhibits was such, however, that it was necessary at times to leaf through numerous documents before reaching the one to which Sank apparently referred.

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Date	Alleged Adverse Action
11/91	Received memoranda dated prior to Nov. 21, 1991[17] telling Sank to attend meeting with Dean of Social Science to substantiate Sank's need for space in research lab.
11/26/91	Harleston promised Sank opportunity to watch videotape of interview with reporter and never followed up on that promise.

12/91 Sank filed grievance with regard to refusal to assign Sank to Academic Advising in the 1992-93 school year.

12/27/91 Harleston threatened to eliminate faculty and department.

1/22/92 Sank assigned to student advising during January intercession after she had already served once.[18]

06/18/92 Requested assignment to Academic Advising in Spring 1993 and request was denied. 09/07/92 Sank filed grievance with CCNY administration regarding illegal department election.

09/24/93 Sank was assigned four courses in Spring 1993 after she had served three courses and one Academic Advising in Fall 1992.

10/02/92 Sank wrote letter protesting that Besmer changed her elective for spring 1993 semester from 29000 to 29500; could cause loss of 29000 course (although apparently it did not so result).

10/08/92 Sank filed grievance against Besmer for conducting illegal department meeting on Sept. 3, 1992 and Sept. 17, 1992.

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[17] Sank claims to have received the memoranda after November 21, 1991.

[18] As evidence for this "action," Sank cites only to a FOIL request seeking information in preparation for "A Grievance Concerning Faculty Required to Serve as Advisors to Students During Winter Intercession." The document does not make clear that Sank alone suffered this hardship.

10/19/92 Sank wrote to NYCCHR seeking to append grievances regarding continued harassment by Besmer and illegal elections; NYCCHR did not contact CUNY regarding claims.[19]

10/19/92 Sank wrote Besmer protesting not being assigned Academic Advising for Spring 1993 semester.

12/17/92 &
02/11/93 Sank sought Step I grievance and was informed of new rule regarding half-credit for Academic Advising.

03/01/93 Sank filed grievance for being assigned to a yearly total of 24 hours that exceeded 21-hour limit.

04/07/93 &
03/15/93 Sank wrote letter to Laderman protesting her telling Sank that the head of Academic Advising was not satisfied with Sank's work when he had told Sank he was satisfied with her work.

11/93 Sank requested she receive credit for three courses for two courses that had a total enrollment of 95 students; that request was denied.

03/15/94 Sank filed grievance about not receiving credit for extra courseload as discussed above.

06/23/94 Sank sought union to join in her grievance filed on March 15, 1994 and the union said no. 12/08/93 Sank offered to be on Space Committee to CCNY president and no one ever responded to letter.

01/20/94 &
02/04/94 Sank received memo stating her grades had not been received in timely manner; Sank replied with her reason for being late and noted that she got her

grades in on Jan. 20, prior to the letter being written on Jan. 21, 1994.

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[19] This allegation appears to be alleged as against NYCCHR, as it is not clear how the Defendants were supposed to be liable for the NYCCHR's purported inaction.

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04/07/94 Sank sought assignment to Academic Advising and was denied.

11/20/94 &
03/27/95 Sank filed grievance because Laderman refused to allow Sank, a physical anthropologist, to replace physical anthropologist on department's executive committee and Laderman changed bylaws purportedly illegally to avoid having Sank on committee.

Although listed separately, these allegations may be broken into twelve general allegations: (1) Sank had to substantiate her need for laboratory space (11/91); (2) Sank was not permitted to listen to an interview tape (11/26/91); (3) Sank first was not assigned to Academic Advising in the Spring of 1993 and, once she was, she had a contractual overload of courses (12/91; 06/18/92; 09/24/93; 10/19;92; 12/17/92; 02/11/93; 03/01/93); (4) Harleston threatened to eliminate faculty positions due to budget constraints (12/27/91); (5) An illegal department election was held (09/07/92; 10/08/92; 10/19/92); (6) Sank was assigned to ANTH 29000 instead of ANTH 29500 (10/02/92); (7) Sank was told that her work in Academic Advising was unsatisfactory when she had previously been told that it was satisfactory (04/07/93; 03/15/93); (8) Sank received two credits for two classes with a total of 95 students although she requested to receive three credits (11/93; 03/15/94; 06/23/94); (9) No one responded to Sank's offer to be on CCNY's Space Committee (12/08/93); (10) Sank was told that her grades were not received on time (01/20/94; 02/04/94); (11) Sank was

again denied an Academic Advising assignment (04/07/94); and (12) The departmental bylaws were changed purportedly to keep Sank

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from joining the department's Executive Committee (11/20/94; 03/27/95).

Because the instant motion deals with Sank's request to be assigned to Academic Advising in the Spring of 1993, she has actually only sought to amend her complaint to add 11 new claims of retaliation.

DISCUSSION

I. Standard of Review

Rule 56(e) of the Federal Rules of Civil Procedure provides that a court shall grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits . . . show that there is no genuine issue as to material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(e); Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Silver v. City Univ., 947 F.2d 1021, 1022 (2d Cir. 1991). "The party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists and that the undisputed facts establish her right to judgment as a matter of law." Rodriguez v. City of New York, 72 F.3d 1051, 1060-61 (2d Cir. 1995). In determining whether a genuine issue of material fact exists, a court must resolve all ambiguities and draw all reasonable

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inferences against the moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Gibbs-Alfano v. Burton, 281 F.3d 12, 18 (2d Cir. 2002).

"The salutory purposes of summary judgment -- avoiding protracted, expensive and harassing trials -- apply no less to discrimination cases than to commercial or other areas

of litigation." Nicastro v. Runyon, 60 F. Supp.2d 181, 183 (S.D.N.Y. 1999) (citing Dister v. Continental Group, Inc., 859 F.2d 1108, 1114 (2d Cir. 1988)). Greater caution must be exercised, however, in granting summary judgment in employment discrimination cases where the employer's intent is genuinely in issue. Belfi v. Predergast, 191 F.3d 129, 135 (2d Cir. 1999). This is so because "[e]mployers are rarely so cooperative as to include a notation in the personnel file that the [action complained of] is for a reason expressly forbidden by law." Bickerstaff v. Vassar College, 196 F.3d 435, 448 (internal quotation marks and citation omitted; brackets in the original). But even where an employer's intent is at issue, "a plaintiff must provide more than conclusory allegations of discrimination to defeat a motion for summary judgment." Schwapp v. Town of Avon, 118 F.3d 106, 110 (2d Cir. 1997); Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir. 1985).

In addressing the present motion, the Court is mindful that the plaintiff is proceeding pro se and that her submissions should be held "'to less stringent standards than formal pleadings

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drafted by lawyers . . . .'" Hughes v. Rowe, 449 U.S. 5, 9, 101 S.Ct. 173, 176 (1980) (per curiam) (quoting Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 595 (1972)); see also Ferran v. Town of Nassau, 11 F.3d 21, 22 (2d Cir. 1993). The pleadings of a pro se plaintiff should be read "liberally" and interpreted "to raise the strongest arguments they suggest.'" McPherson v. Coombe, 174 F.3d 276, 280 (2d Cir. 1999) (quoting Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994)). Nevertheless, the Court is also aware that pro se status "'does not exempt a party from compliance with relevant rules of procedural and substantive law." Traguth v. Zuck, 710 F.2d 90, 95 (2d Cir. 1983) (quotations omitted).

II. Law of the Case Does Not Prohibit This Motion

Sank first argues that the "law of the case" should bar the Defendants from bringing this motion.

The law of the case doctrine "'posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" Arizona v. California, 460 U.S. 605, 618 (1983). Application of this doctrine is discretionary "and does not limit a court's power to reconsider its own decisions prior to final judgment." In re Crysen/Montenay Energy Co., 226 F.3d 160, 165 n.5 (2d Cir. 2000), cert. denied, 532 U.S. 920 (2001) (quoting Sagendorf-Teal v. Co. of Rensselaer, 100 F.3d 270, 277 (2d Cir. 1996)). See Aramony v.

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United Way of Am., 254 F.3d 403, 410-11 (2d Cir. 2001) (rejecting law of the case argument because the court had not yet decided the issue and in any event the doctrine is discretionary).

The issue of whether the Defendants are entitled to summary judgment on the retaliation claims arising from Sank's course assignments in Spring 1993, the Defendants' response to the error in the Fall 2001 Schedule of Classes and the other, newly specified claims discussed above has not yet been decided. The Defendants' previous motion for summary judgment, dated April 13, 2001, addressed only those claims raised in Sank's NYCCHR charge and in the Amended Complaint. Indeed, Sank did not specify the two particular actions regarding her course assignments and the error in the schedule of classes until she moved for reconsideration in May 2002.[20]

On September 26, 2002, the Court denied the Defendants' motion that had sought dismissal of the retaliation claims on jurisdictional grounds.[21] Transcript at 3. The Court did not, however, decide the Defendants' entitlement to summary judgment based on the two specified remaining claims. In addition, because

[20] As noted by the Defendants, the Fall 2001 course catalog had not even been published at the time they filed their original summary judgment motion.

[21] The Defendants argued that the actions alleged by Sank in her motion for reconsideration were not reasonably related to those in her charge of discrimination and thus they should be dismissed from the action.

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the Defendants were specifically invited to make the instant motion, this Court will in any case exercise its discretion to hear the motion. As a result, Sank's argument to deny the claim based on the "law of the case" doctrine is denied.

A response is necessary, however, to Sank's assertion that the Defendants are somehow trying unfairly to take away her right to a jury trial, which attaches to any of her claims that occurred after the effective date of the 1991 Civil Rights Act. Sank only has a "right" to a jury trial if her claims of retaliation occurring after November 21, 1991 are viable. The Defendants also have a right to attempt to show that her claims are not viable, i.e. that they will not survive a motion for summary judgment, before being forced to submit to a jury trial and its concomitant costs. Indeed, it would be a waste of judicial resources if all claims were allowed to go to trial without first being tested by summary judgment. Therefore, the Defendants are merely exercising their right to attempt to show that Sank's claims are not viable and that a trial is therefore not necessary. The Defendants presumably would have done so almost two years ago in their original summary judgment motion if Sank had clarified that her allegations of retaliatory actions had extended beyond those listed in her charge and amended complaint.

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III. Sank's Claims of Retaliation

The Defendants first argue that Sank should not be permitted to include her newly specified claims of retaliation in her complaint and next argue that the previously identified claims fail because Sank has failed to present a material issue

of fact showing a causal connection between the action and the protected activity and showing that the Defendants' legitimate, non-discriminatory reasons were pretextual.

A. New Claims

Sank has alleged approximately 23 "new" acts of retaliation. Of those, at least seven of the alleged acts are interrelated with the previously established claim of Sank's complaints about her Spring 1993 course schedule and will be incorporated in the discussion of that claim.[22] Sank's inclusion of the other acts will be treated as a motion to amend her complaint to include those acts and analyzed under the rubric of Rule 15(a) of the Federal Rules of Civil Procedure.

Rule 15(a) provides that the district court should freely grant leave to amend the pleadings. Fed. R. Civ. P. 15(a). The amendment should be permitted absent evidence of circumstances such

[22] These are the actions complained of that occurred on June 18, 1992; September 24, 1993; October 2, 1992; October 19, 1992; Dec. 17, 1992 and Feb. 11, 1993; March 1, 1993; and March 15, 1994.

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as undue delay or bad faith, undue prejudice to the opposing party or futility. Foman v. Davis, 371 U.S. 178, 182 (1962); see also Jones v. New York State Div. of Military and Naval Affairs, 166 F.3d 45, 50 (2d Cir. 1999) (affirming district court's denial of leave to amend due to futility of amendment). Present here is evidence both of undue delay and of futility.

First, Sank's allegations start with actions occurring right around November 21, 1991 and end with an action on March 27, 1995. Thus, Sank is now attempting to amend her complaint to add for the first time actions that occurred from eight to more than eleven years ago. Moreover, she is doing so after the Defendants have already filed two motions for summary judgment and after a bench trial has already been

held on claims occurring prior to November 21, 1991. This is classic case of undue delay. Sank should have raised each of these allegations in her motion to reconsider this Court's decision holding that Sank did not have a right to a jury trial. Thus, the Defendants would have had the opportunity to respond to them in this summary judgment motion. Instead, if the allegations were to be admitted, the Defendants would certainly have to have the opportunity to file a third motion for summary judgment against the new claims.[23] In addition, the

[23] It is true that the Defendants had the opportunity to reply to these allegations in their reply memorandum. It was unnecessary for them to conduct the necessary investigation, research and presentation of the facts, however, if their current argument succeeds that the allegations should not be added to the Complaint. Therefore, they have not had a proper opportunity to respond to the allegations.

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fact that Sank's list of actions stops at 1995 raises the spectre that when next the Defendants file a summary judgment motion, Sank will append in opposition yet another list of alleged retaliatory actions running from 1995 to whatever the filing date of those papers are. As noted in earlier opinions, it is time for this case to come to a halt. Sank has been given every opportunity to make her case. Her pro se status will only excuse so much; raising claims for the first time eight to eleven years after they occurred -- and at extremely opportune timing in order to preserve her claim -- is not a thing to be easily excused.

In any case, the claims are futile. A Title VII retaliation claim is analyzed under the rubric of McDonnell Douglas. Tomka v. Seiler Corp., 66 F.3d 1295, 1308 (2d Cir. 1995). First, in order to make out a prima facie case of retaliation, a plaintiff must establish that (1) she engaged in protected activity; (2) defendants were aware of the activity; (3) she was subjected to an adverse employment action; and (4) there is a causal connection between the protected activity and the adverse employment action. Gordon v. New York City

Bd. of Ed., 232 F.3d 111, 116 (2d Cir. 2000); Quinn v. Green Tea Credit Corp., 159 F.3d 759, 768-69 (2d Cir. 1998). The Second Circuit has held that a close temporal relationship between the protected activity and an employer's adverse actions can be sufficient to establish causation. Treglia v. Town of Manlius, 313 F.3d 713, 720 (2d Cir. 2002) (citing Cifra v. General Elec. Co., 252 F.3d 205, 217 (2d Cir.

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1998) ("The causal connection needed for proof of a retaliation claim can be establish indirectly by showing that the protected activity was closely followed in time by the adverse action.") (internal quotation marks omitted)). For mere temporal proximity to establish causality, the intervening period must be "very close." Clark Co. Sch. Dist. v. Breeden, 532 U.S. 268, 273, 149 L. Ed.2d 509, 121 S. Ct. 1508 (2001).

If the plaintiff establishes a prima facie case of retaliation, the defendant may articulate a legitimate, non-retaliatory reason for its actions. Id. at 768. Finally, if the defendant does so, the plaintiff must prove that the proffered reason is merely a pretext for retaliation. Id. at 769.

As an initial matter, the majority of Sank's newly alleged claims are not even adverse employment actions. For instance, she cites to several memoranda telling her to attend a meeting about Sank's need for laboratory space, to the fact that the union would not join her in one of the many grievances against CUNY documented in her papers and even to the fact that the NYCCHR apparently never responded to one of her allegations. These are not adverse actions.[24] The only claims that could be potentially

[24] To sustain an adverse employment action, a plaintiff must "endure[] a 'materially adverse change' in the terms and conditions of employment.'" Galabya v. New York City Bd. of Educ., 202 F.3d 636, 640 (2d Cir. 2000). In order for the action to be "'materially adverse,' a change in working conditions must be 'more disruptive than a mere inconvenience or an alteration of job responsibilities.'" Id. (quoting Crady v. Liberty Nat'l Bank and Trust Co. of Indiana, 993 F.2d 132, 136 (7th Cir. 1993)). A

"'material adverse change' is one that 'has an attendant negative result, a deprivation of a position or an opportunity.'" Campbell v. Grayline Air Shuttle, Inc., 930 F. Supp. 794, 802 (E.D.N.Y. 1996) (citing Medwid v. Baker, 752 F. Supp. 125, 136-37 (S.D.N.Y. 1990)). While adverse employment actions extend beyond readily quantifiable losses, "not everything that makes an employee unhappy is an actionable adverse action." Phillips v. Bowen, 278 F.3d 103, 117 (2d Cir. 2002) (stating that employee's "trivial complaints about an unpleasant working environment" do not constitute adverse employment actions).

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considered "adverse actions" are: (1) the denial of Sank's request in November 1993 to receive three credits for teaching two courses with a total enrollment of 95 students; (2) the fact that Sank was again denied an assignment to Academic Advising after her request in April 1994; and (3) purported maneuvering by the Anthropology Department and Chairperson to avoid Sank's secession to the department's executive committee in March 1995.

With regard to her claim that she should have received three credits for two classes with a total enrollment of 95 students, Sank was informed that the general rule is that an enrollment of 80 or more students is required for a class to qualify for two credits. Memorandum from Dean Jeffrey Rosen, at 1 (Nov. 16, 1993). The action occurred years after Sank filed her latest charge of discrimination and therefore Sank cannot establish a causal connection by temporal proximity. Further, she has not provided any direct evidence of retaliation. Therefore, this claim would fail at the outset as Sank has not made her prima facie case. In any case, Sank has not presented any evidence that others who were similarly situated were treated differently when they taught

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a class of less than 80 students and sought to receive two credits for it. It is noteworthy that, on May 5, 1994, the union declined to join Sank in a grievance, which she had filed regarding this allegation on March 15, 1994. It thus appears that Sank will be unable to meet her eventual burden of proving pretext.

The second claim is that Sank was again denied an Academic Advising position for the Spring of 1995. On April 7, 1994, Sank requested that she be assigned to ANTH 285D, ANTH 101E and ANTH 101F. She noted in a footnote, however, that she again was requesting that she serve in Academic Advising instead of teaching ANTH 101F. In light of the determination, infra, with regard to Sank's other claim based on her not being assigned to Academic Advising, this claim also appears futile.

The final claim is that the Anthropology Department, through the actions of its chairperson, changed its bylaws in order to avoid having Sank on its executive committee.*fn25 Sank filed a grievance regarding this issue. In a letter dated March 27, 1995,

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[25] In a grievance dated November 20, 1994, Sank asserts that the Department of Anthropology had, since its inception until the actions complained of, functioned with by-laws that stipulated that at least one faculty member from each of the four fields of Anthropology (archeology, cultural, linguistics and physical anthropology) had to be represented on the department's executive committee. On September 1, 1994, it was announced that it was against the university's by-laws to require departments to have the members of its executive committee representing the different fields in that department. The chairperson requested a vote eliminating that rule in the bylaws. Sank challenges her motive for seeking that vote and the way in which the vote was held.

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the union again refused to join Sank in this grievance. The union representative wrote:

> [T]he issues you have raised do not constitute a violation of the PSC/CUNY agreement or any rules or regulations as promulgated by the CUNY Board of Trustees including the bylaws. As I have previously written you ..., in making any claim of discrimination under Article VIII of the contract the burden of proof in making such a claim rests solely on the Union and we

> must provide evidence and testimony to support such a claim. We have no such objective proof that the actions taken by [the department chairperson] were discriminatory against you.

Letter from Professional Staff Congress of CUNY, at 1 (March 27, 1995). In a letter dated April 10, 1995, Anderson, dean of faculty relations, included a summary of discussions held regarding Sank's complaint. These discussions appeared to be held to seek a good faith solution to Sank's complaints. There is no temporal proximity between the vote complained of and the Sank's protected actions. Further, Sank has presented no direct evidence that CUNY's apparent rationale, based solely on the papers submitted by Sank, that the university bylaws did not permit the Anthropology Department bylaws to remain, was a pretext for discrimination. Nor has she pointed to any similarly situated person who has been treated differently. As a result, this claim would be futile if added and Sank's motion to amend her Complaint to add it is denied.

Thus, it is only necessary to consider whether Sank has raised a genuine issue of material fact with regard to her remaining claims.

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B. <u>The Remaining Claims</u>

As a result of the above determination, Sank's only remaining claims are those based on the 1993 course schedule that did not include Academic Advising, the errors in the Fall 2001 course catalog and the cancellation of one of Sank's courses in the Fall of 2001 for under-enrollment.

Sank has not established any direct evidence of retaliatory animus for any of her claims. Therefore, she must rely on temporal proximity alone to establish a causal connection. Sank filed her first discrimination charge on August 8, 1989, and her third and final charge on March 3,

1990. The first act of which Sank complains, the failure to assign Sank to Academic Advising, first became an issue in December 1991, and was not effectuated until the spring of 1993. Thus, at the earliest, approximately twenty months elapsed after the filing of Sank's latest discrimination charge to the beginning of the complained of activity. Such time is too great to support a causal connection. Clark Co. Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001) (granting summary judgment in favor of defendant employer on retaliation claim where 20 months had elapsed between EEOC charge and alleged retaliatory act, on the grounds that the temporal proximity between employer's knowledge of the protected activity and adverse employment action must be "very close"). The other actions complained of occurred in the spring and fall of 2001. The most proximate protected activity

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to that time was Sank's commencement of this lawsuit, the latest amended complaint of which was filed on May 27, 1994. The approximate seven years separating the protected activity and the purported adverse action is no where near "very close" and thus cannot support a finding of causality.[26]

Even resolving all ambiguities and drawing all inferences in Sank's favor, she therefore has failed to meet her prima facie case with regard to these events. Manessis v. N.Y. City Dep't of Trans., No. 02 Civ. 359, 2003 U.S. Dist. LEXIS 1921, at *38 (S.D.N.Y. Feb. 10, 2003) (granting summary judgment in employer's favor because plaintiff failed to adduce direct evidence of retaliation or a temporal proximity establishing causality). In any case, even if she did not, she has failed to raise a triable issue of fact with regard to whether the Defendants' legitimate non-discriminatory reasons were pretextual.

With regard to Sank's course schedule in the spring of 1993, the Defendants have pointed to the financial difficulties facing CCNY as a legitimate, non-discriminatory reason. It is

undisputed that CCNY in 1992 reduced by half the amount of release

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[26] In addition, the decision-maker in this instance was unaware of Sank's claims. Gordon v. N.Y. City Bd. of Ed., 232 F.3d 111, 117 (2d Cir. 2000) ("lack of knowledge on the part of particular individual agents is admissible as some evidence of a lack of a causal connection, countering plaintiff's circumstantial evidence of proximity or disparate treatment" but jury nonetheless can find retaliation if "an agent is acting explicitly or implicitly upon the orders of a superior who has the requisite knowledge").

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time available for all faculty in all departments who participated in Academic Advising. Further, Sank has not disputed that CCNY was experiencing financial difficulties at that time, and that those difficulties necessitated the curtailment of available release time for all faculty at CCNY. In addition, although her request was at first denied, Sank was eventually assigned to Academic Advising in the Spring of 1993 in addition to the other three courses for which she had been assigned and which she was required to teach to fulfill her obligations. This assignment resulted in Sank's having a "contractual overload."

When she filed a grievance about this overload, the compromise reached was that she would withdraw her grievance in exchange for resigning from Academic Advising and receiving compensation for the 15 hours she spent in the program. Sank has presented no evidentiary support for her contentions that the above actions occurred as a pretext for retaliation.[27] Indeed, given the handling and settlement of her grievance in that regard, it would

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[27] The factual dispute with regard to the knowledge of the department chairman, Besmer, of the discrimination charge at the time of the course assignment is insufficient to save this claim. E.g., Aguirre v. N.Y. State Police, 156 F. Supp.2d 305, 323 (S.D.N.Y. 2001) (dispute regarding defendants' knowledge of plaintiff's previously filed EEOC charge did not prevent grant of summary judgment in defendants' favor on Title VII retaliation claim because plaintiff had not offered evidence to establish that his termination was based on retaliation, rather than on a non-retaliatory

reason, i.e., misconduct). In any case, Sank now alleges that she was first denied the position in December 1991, when Laderman -- not Besmer -- was still chairperson. Indeed, it was Laderman who eventually relented and assigned Sank to Academic Advising.

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be difficult for her to do so. Therefore, her claim regarding an Academic Advising assignment in the spring of 1993 cannot stand on these grounds either.

Sank's second remaining claim involves the error in the Fall 2001 course catalog. It is undisputed that CCNY's records show that the error in the course schedule was corrected on May 8, 2001. Nor has Sank presented any evidentiary support for her contention that the error remained uncorrected or that the May 8, 2001 record was somehow manufactured after the fact. She merely speculates that even if the prerequisite was deleted in a timely fashion, the fact that it remained in the course catalog likely scared students away from her course. This speculation does not rise to the level of a triable issue of fact, particularly given the fact that the error likely resulted from the upgrade of the SIMS system, that there is no evidence that the person in charge of the process was aware of Sank's discrimination charge and lawsuit, and the fact that the error was corrected in a timely manner and in the same manner in which similar errors were corrected.

It is true that Sank requested that the administration take additional steps to correct the mistake than they normally take by, for instance, printing and distributing an errata sheet to reflect the deletion of the prerequisite, and that the administration refused to do so. There is no evidence that the administration ordinarily took these extra actions, and as a result, Sank

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cannot base a retaliation claim on the fact that the administration acted as it normally did, instead of going beyond the norm. As a result, the Defendants' motion with regard to this claim is granted, and Sank's claim based on the

error in the catalog must be dismissed for failure to raise a triable issue of fact with regard to whether the Defendants' rationale was pretextual.

Sank's final claim is somewhat related to the error in the course catalog, in that she claims that the mis-described ANTH 29500 was precipitously cancelled for being under-enrolled. The Defendants have presented a legitimate non-discriminatory reason for this cancellation: ANTH 29500 had an enrollment of only three students, and the lowest enrollment of all the Anthropology electives. The Dean of Social Sciences therefore decided to cancel ANTH 29500 for lack of enrollment and to permit two other underenrolled classes, ANTH 24600 and ANTH 24900, which had seven and five students respectively, to remain open in anticipation that they would enroll a minimum of ten students.

There is no evidence that the Defendants' legitimate non-discriminatory reason was a pretext. Sank did not complain about any other cancelled courses occurring in the prior twelve years since she first filed her discrimination charge. In addition, there is no specific evidence that the administration created the "less than ten students" rule as a means of canceling Sank's course, nor that the administration failed to enforce the rule

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against others similarly situated except for the other anthropology electives that had larger enrollments than ANTH 29500. The mere fact that the administration chose only to cancel the lowest enrolled of the anthropology courses is insufficient to raise a genuine issue of fact with regard to whether its rationale was pretextual.

Sank has suggested that the administration should have stayed the cancellation until the end of the registration period (one day after it was cancelled, August 23, 2001), or even later. While such action perhaps could have resulted in the class garnering seven more students, it also could have

resulted in the three or more students registered in the class being forced out with no time left in the registration period to seek another elective. In light of the absence of any evidence that the administration acted contrary to established policy or treated Sank differently from those similarly situated, Sank's speculations are insufficient to raise a triable issue of fact. As a result, the Defendants' motion regarding Sank's claim based on the cancellation of ANTH 29500 is granted, and that claim is dismissed.

To sum up, a Title VII retaliation claim will not be permitted to become a vehicle to litigate grievances by a tenured professor at war with the administrators of the college.

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Conclusion

For the foregoing reasons, Sank's motion to amend her complaint to add additional claims of retaliation dating from eight to eleven years ago is denied, and the Defendants' motion to dismiss is granted. Sank's remaining claims of retaliation are hereby dismissed.

It is so ordered.

New York, NY
April 4, 2003

/s/ Robert W. Sweet
ROBERT W. SWEET
U.S.D.J.

DECIDED: April 4, 2003
CITATION: *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), 5471 (S.D.N.Y. 4/4/2003)

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
DIANE SANK,

Plaintiff,

- against -

94 Civ. 0253 (RWS)
ORAL
OPINION

THE CITY UNIVERSITY OF NEW YORK, JOSEPH MURPHEY, et al.,

Defendants.
----------X

APPEARANCES:

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The following Opinion, orally issued October 7, 2002, is referenced by the page numbers of the bench trial transcript, with The Hon. Robert W. Sweet, U.S.D.J., presiding. The following is from final Trial Transcript, Volume 6.

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Summation - Ms. Sank

1 So in conclusion, on the basis of all of these facts,

made clear by my own testimony, that of other witnesses, and even that of Dr. Harleston himself, the documents which I have placed in evidence, the transcripts of Dr. Harleston, the depositions of Dr. Harleston, and the various facts which your Honor has taken as established, defendants should be found to have discriminated against me in removing me from my chair position and retaliating against me for complaining of that discrimination to the Human Rights Commission. And for that I thank you, your Honor, for your patience, your extraordinary patience and your consideration of my case. And I rest my case.

THE COURT: Thank you all.

MR. BANK: Your Honor, do we have any schedule after this to deal with?

THE COURT: Yes, we will.

The parties to this dispute are Diane Sank, who has represented herself from time to time in these proceedings pro se. She is a courageous and stubborn woman, born in 1927. The defendant in this case is the City University of New York. Mrs. Sank has been at the City University of New York as a Professor of anthropology since 1968. And she was chairman of that department from 1969 to 1972.

This case has been a long, drawn out, difficult litigation. It started on January 18, 1994, and the extent of

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the suffering by both the parties and the Court is exemplified by the 35 pages of docket entries in this matter.

The nature of the case is, it is a Title VII discrimination case in which Mrs. Sank urges that her discharge as chairman of the department was an act of discrimination against her by the president because she is a white female.

In addition to that, she has alleged in this proceeding that she was retaliated against by the taking of her lab, the way in which the taking was accomplished, and also by the denial of certain requests for leave.

There is remaining in the case, as a result of my opinion of July 31st of this year, a claim for post '91 retaliation, which, as that opinion indicates, is subject to a jury trial. This trial, of course, has been a non-jury trial which commenced on September 30 and is closing today.

In the course of this trial, witnesses have been presented. In particular, of course, the plaintiff, Diane Sank, Lucie Saunders, Howard Adelson, Bernard Harleston,

Owen

Lynch, Anna Causi, Anthony Pecheko, Jeffrey Rosen, Fremont Besmer, Carol Laderman, Leonard Jeffries, and John Deane.

Based on these proceedings, I reach the following factual conclusions, findings of fact: I think the plaintiff, Mrs. Sank, was well described by the outside review committee as the victim of the neurosis of her department. That is, I believe, an accurate description, and I also think that it has

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created other neuroses which followed it.

By way of background, the university, of course, is a functioning institution of higher education and for many years was the jewel in the crown of the city in that regard. It is, like every university, governed by a set of somewhat difficult-to-comprehend and arcane rules relating to faculty conduct, department administration, and other such matters.

In addition, of course, to the traditions of academia and its rules for self-governance, there is a union contract, and that also provides for certain remedies. And of course, in addition to that, there are the statutes which gave rise to this particular claim.

The department of anthropology at the City University has been in turmoil over a period of years, and Ms. Sank explained the nature of the controversy in the department. The department prides itself on a four-field discipline, which simply indicates that there are specializations within the field of anthropology, and they range on the right, or on the left, depending on one's point of view, from genetic or biological anthropology, and at the other end of the spectrum, cultural anthropology.

(Continued on next page)

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These fields are strongly felt and they are reflected in contention between the faculty members, and it is difficult to reach a consensus. In addition to this, this is a department which over time has suffered attrition and is now in a weakened condition, this partly as a result, as indicated by the outside review committee, of the emphasis on the core curriculum and a review of the anthropologists and insufficient support from the administration for their discipline. The result of this has been turmoil in this particular department.

The president of the college, by way of background during the period in question, was Bernard Harleston from 1981

to 1992. Prof. Harleston is a black and was devoted to doing all that he could to improve the ethnic balance of the university, and in his view that meant a strong program of affirmative action seeking more people of color to join the faculty. He noted that four out of five of the students are minorities, and this effort at affirmative action was as aggressive as he could make it. There was also a course of conduct which has been demonstrated in this trial where on a number of occasions whites and sometimes females were replaced by the administration by black males.

It is also clear that this is the subject that Prof. Harleston believes in as entirely appropriate. There has been mention, and he has acknowledged his membership in Sigma Pi Phi, an organization devoted toward, at least in part, not only

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the brotherhood, but the advancement of its members, almost all of whom are black and all are male.

Without specific reference the statistics in this area presented by Ms. Sank are far from complete, but they do indicate a course of conduct which reflected efforts by President Harelston to achieve affirmative action in the university. With that background in mind, that brings us to consideration of the facts relating to particular charges which have been brought here.

The history of the department as the chairmanship of the department is that Prof. Sank was chairman of the department between 1969 and '72 and according to her testimony, which was unchallenged, she was highly successful. There were more students and more majors interested in anthropology and taking graduate degrees. In the period from 1972 to 1987 two professors of the department alternated the chairmanship, Professors Leacock and Nash. This was an arrangement which was obviously satisfactory to them and to the department. Unfortunately, Prof. Leacock died, and in the Spring of '87 it was necessary to consider a replacement, and the faculty of the department split asunder, I gather not and unusual circumstance for that faculty. Parenthetically, the practice, presumably in all but at least in this university, is to have the chair of the department elected by the faculty, and after an initial split there was a switch of one member, and Ms. Sank Was

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elected. The initial vote was four to two. Whether it was made unanimous thereafter, I'm not sure, but, in any case, she was elected as chairman of the department in the Spring of '87.

There was, however, a cloud on the horizon in the form of an outside review committee which was asked to serve and appointed in the fall of '87. An outside review committee is an academic review, as the name implies, from those outside of the university, and the anthropology department was just one of the departments that was reviewed. There were two professors, Prof. Pollister from North Carolina, I believe, and Prof. Owen Lynch from NYU. The state of the department obviously was the subject of concern, and the president requested that the chairman prepare a report on the state of the department. That report is part of the record and was prepared by the chairman, Mrs. Sank, somewhat under protest, because it was her view that the prior department chair had failed to accomplish his duties in that regard. Nonetheless, a report was submitted. The report itself, I think carefully reviewed, indicates some of the distress in the department.

The outside reviewers conducted their study. They visited the department on December 3rd and December 4th of 1987 and talked to the members of the department. They rendered their report on January 13, 1989, and in that report recommended that the chair of the department be relieved and that an outside chair be appointed, as the word receivership

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has been used, in effect to run the department until a search could be made for an outside chair. The line which grabs Mrs. Sank's attention and the attention of anybody who has read the report is on page 10. And the conclusion of the outside review committee that: "The responsibility for the department's presence distemper, disarray and drift is that of the department as a whole." There is nothing that has been demonstrated in this trial to counter that conclusion.

There has been an attack upon the report on the grounds that it does not have any basis and without rehearsing the report, there are practices, the use of students, the use of adjuncts course curricula, other things that form a substantive basis for the conclusions of the committee. The committee report having been made, the department, whether it was invited or sought I don't recall precisely at the moment, but, in any case, the department responded to the outside review committee.

Mrs. Sank responded in very clear and emphatic terms and four other members of the department responded. The four supported the conclusions of the report, including the replacement of the chair. In this regard it appears that at least one of the members of the faculty changed an opinion from a previously held opinion. Then the president met with the department as a whole which together with the dean. Parenthetically, here again, there is a dean of social

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sciences. This is the dean who supervises more than one department, but in this case supervised the anthropology department and provost, also, as I recall, met with the faculty. The report of the outside review committee was discussed, and while there are differing views of that discussion as to its depth, I conclude that was an appropriate meeting for the circumstance, the result of which was that the president concluded that he had the support of the faculty, not all of the faculty to be sure, but the support of the faculty in making a change.

Also, the report recommended three people to be considered as conducting this receivership, Lucille Saunders, Jane Snyder and Delmos Jones. Saunders and Snyder had been chairs of anthropology departments in other institutions or graduate center of the City University, and the third candidate was Delmos Jones who was an anthropologist at the graduate center of City University. These three candidates were suggested in the report.

On April 27, Mrs. Sank Was discharged by the president and subsequently Jones was designated as, I believe, the acting chair of the department and then subsequently by vote of the department. That vote took place in June, and one of the facts of academic life that has been demonstrated in this case is that nothing happens during annual leave, and any act committed during annual leave is null and void. And that in fact was

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Mrs. Sank's position, and it turned out that that position was upheld. I guess it was the following year in point of fact that that happened.

In any case, Jones served as chairman of the department during the academic year '88-'89. Following that, he declined to continue in that post and the faculty selected Freemont Besmore to serve for the year '89-'90 and that meeting

took place in June. Mrs. Sank filed a grievance. Ultimately, the election was terminated, I guess is the way to put it, held null and void, and then another election was held and Besmore proceeded to be the chairman of the department.

During the first Jones year '88-'89, an effort was made to find a chairman for the department from outside which was unsuccessful. Then in the year '89-'90, another effort was made which resulted in a selection by the president from the search committee which had been made up of the members of the faculty, and there has been testimony both with respect to the search in the Spring of '88 and the appointment of Jones, and the search in '89 with respect to the appointment of Besmore as to whether the practice was to rank candidates or not to rank them.

I should also note that Delmos Jones is a black male. President Harleston testified that he did not believe the recommendation came to him ranked, and that he in all instances disregarded ranking and made his own decision based on whatever

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advice he had from the dean or the provost.

Mrs. Sank in the Spring of 1988, after the report, wrote a letter to the president indicating that it was her intent to remain as chair, both on the merits and as a matter of academic procedure and freedom, objecting her removal or contemplated removal by the president. In that connection she has pointed out, without contradiction, that there had been no prior instance of a removal of a faculty-appointed chair. However, there is no contention here that the president was acting outside of his authority since he relied on a provision of the bylaws that permitted such removal of a department head and the language of the bylaw is: "In the interests of the college."

There has been testimony to the effect that Mrs. Sank was not offered an opportunity to resign and that is indeed the case, she was not, although such an effort in the light of her letter was contradicted and easy resolution of the issue.

Following this change in the chairmanship of the department a year later Mrs. Sank Was deprived of her lab, and in her view, as she put it, this is the crux of the case. It should be noted, and I should have noted it earlier, Prof. Sank has a distinguished career and that was well noted by the outside review committee that stated: We were impressed with her development of new techniques for computer analysis and

some other things, and they indicated that she should be

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encouraged and receive support. Essential, she maintains, to this work is a lab which would house whatever an anthropologist houses by way of research. In this case I suppose fingerprints but what else I don't know; also, computers and other materials which she feels were essential to her. And it was her position that, and in this proceeding she has taken the position that the only reason her lab was removed was as an act of retaliation.

I should note, of course, and the record is full of it, that she filed the appropriate proceedings to make a discrimination claim and received the right to sue letter although the Commission of course found no grounds on which to act.

The subject of space in the City University has been an extremely difficult one over time, and the testimony of the vice-president in charge of space -- which somebody noted was an interesting title -- but his job was to find additional space in order to be able to renovate a substantial building on the campus, and that was a task which he undertook in the Fall of 1988. In connection with that, he toured the campus, spoke with the space advisory committee, that was both faculty and administration group, on the subject of space needs and such. As he made this tour, he came to the conclusion that the laboratory which was Mrs. Sank's, 705, was not being utilized or not being utilized to a high degree. The pressure for space

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was in part as a result of the demands of the computer science department, understandable I suppose in today's world, and it had been initially planned that is by the vice-president in charge of space, to take room 706 and 707 for that purpose. As he reviewed this and he discussed this with the dean of the social sciences department, Dean Rosen, and they had meetings on June 27th and June 28th in which his proposals were discussed and these proposals were then passed on to the department chairman at that time.

The department was not overly concerned because they wanted to preserve one particular room and they were assured that was going to happen. As this survey continued, the computer science department made a demand for contiguous space,

and that caused a review which in turn caused Posenko to determine that the room 705 and 706 should be taken, and he also discussed this with Dean Rosen. After these discussions, he then formulated a plan. He had these discussions with Dean Rosen. Rosen was aware that this plan would create problems and in particular for Prof. Sank, and notified the provost that the plan was going forward. The plan was codified in a removal schedule of July 13th, and in that removal Posenko upon completing this plan very sensibly left town, And went on vacation until the end of the month. However, the plan, of course, became known and became known to the chairman of the department.

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Communication between members of the department and the staff and the administration on subjects apparently is a matter of boxes, and you can put something in somebody's box and Besmore saw the plan on the 20th of July and recognized that it would create distress for Prof. Sank because the plan called for the removal of the materials in her lab, and the placement of those materials in another room 703.

Recognizing this difficulty, he left a letter in her box for her advising her of these facts and also directed that a letter be mailed to her by the secretary of the department. One of the recommendations of the outside review committee was that the secretary of the department who was, Sandra McDonald, was something of a problem in terms of her functioning, and that she as well as the chairman were to be removed.

Mrs. Sank had proffered, although I have not reviewed it, an envelope which she says is the envelope in which the letter arrived which was postmarked on July 26. The notice that the chairman of the department got of these events took place on Thursday, the 20th. The mailing was on the 27th according to the postmark, and Mrs. Sank received the information on the 27th. The postmark was on the 26th. She received the information on the 27th. It happened that the chairman was in the department on the 27th, that is the Thursday, and Thursday apparently is pay day, which is the motivating fact, even during annual leave, for people to come

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visit the department.

In any case, he was at the department. He spoke with his secretary, and asked whether or not anything had happened,

and she reported that no action had been taken with respect to the move. When on the 28th Mrs. Sank received information about this move she was distressed in the extreme and among other things, called Dean Rosen up and Prof. McCracken who was of the computer science department who indicated that he didn't care what room she had as long as they were contiguous, and, by the way, didn't she know that it was all done anyhow, and that it was finished. Rosen offered to meet on the 31st and to discuss it and to make some plans to see if there was additional space that could be made available to ameliorate the situation.

Mrs. Sank viewed the premises on the 28th and was upset to find that the lab had disappeared, as she couldn't, I gather, get into where it had been taken because she didn't have a key. I should also add that as far as witnesses go, Richard Pashenko was entirely credible, forthright and direct. He is a respected architect and has moved steadily from one institution to another with ever increasing responsibility and respect. He was an impressive witness. He also testified that he didn't know Prof. Sank or of her discrimination complaint.

In addition, to the claim of retaliation with respect to the removal of the lab, there is the claim relating to the

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award of fellowships. Mrs. Sank sought in '89 and '90 to be awarded what are called full pay half semester fellowships. The description of the fellowship indicates its purpose, and the testimony was clear that these fellowships are rarely given and that there is a greater probability of being able to get a fellowship which of course is discretionary, if one seeks a half pay full year fellowship. The economics of that apparently is a fact.

These fellowships are granted by a process in which the applicant fills out an application. The application is voted on by the appropriate departmental committee. It then goes up the chain to the administration and then ultimately to the City College review committee, and then ultimately to the president. In 1989, that process was followed and the application did not get beyond the City College review committee. It was approved at the departmental level by the faculty, and through the administration, but failed at the City College review committee.

The application the following year failed to gain the approval of the executive committee of the department and there is some indication that perhaps it had not accorded to the

necessary time schedule, but, in any case, it did not gain the approval of the department.

In this connection, there is a provision in the collective bargaining agreement to the effect that special

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consideration should be given to people seeking leave who have been members of the faculty for 14 years. In any case, President Harleston did not act on the leave request because they had not reached him.

As a result of the factual findings, and applying the customary McDonnell-Douglas procedures with respect to the burden of proof, I conclude that there was a prime facie case of discrimination that Mrs. Sank established a prima facie case of discrimination, and I'm speaking now of her discharge; that there was a explanation by the City University; that explanation in short being the recommendation by the outside review committee, and Mrs. Sank has not established that that explanation was pretextual. Therefore, that cause of action has not been established.

In that connection, we're familiar with the problems that are created. First of all, the discharge is not the replacement. The two acts were not simultaneous. In fact, the discharge occurred independent of the selection of Jones, but it is fair to say that given his effort toward affirmative action President Harleston undoubtedly, if all other things were equal, would have selected a black male or perhaps a black female, but certainly an African American. The Supreme Court in Johnson v. Transportation Agency, 107 Supreme Court 1442, has noted the appropriateness of having a moderate flexible case by case approach to gradual improvement in the

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representation of minorities. Our Court of Appeals has similarly indicated in Klow v. City of New Haven, 2000 Westlaw 338066 2d Cir., [sic] the intent to remedy past discrimination against minorities does not amount to forbidden racial classification or an intent to discriminate against nonminority candidates unless it involves quotas, set aside preferential grading that prevents nonminorities from competing. This obviously is a clearly difficult clearly area, but the facts here do not establish that the independent outside review was pretextual.

One could hypothesize that the recommendations of the

outside committee were not held in good faith and that the intent of the committee was to recommend a black, but there is no evidence of that, and I refuse to draw that inference. Having had the testimony of Prof. Lynch, it's a good faith honest recommendation which obviously was quite offensive to Mrs. Sank, but, nonetheless, was not pretextual and she has not established that it was pretextual.

With respect to the retaliation, the taking of the lab was similarly not, one could argue, that a prima facie case was made just by virtue of the filing of the discriminatory complaint by Mrs. Sank and an adverse action. But even if you reach that conclusion, which I don't, but even if you did reach that conclusion, there was an independent basis for taking the lab that clearly was not pretextual. It was not aimed at Prof.

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Sank. It was aimed at obtaining space that the university needed in order to rehabilitate their other facilities and while she may feel that the department did not stand up and fight for her, the department in fact was relatively weak in terms of the relative demands of the two departments. So that the decision to take the lab was not a retaliation. It was an action by the university to solve their construction needs.

As far as the question of the notice, perhaps all it does is to demonstrate that the outside review committee was correct in recommending a new secretary, if in fact the letter which was to be mailed, according to the chairman of the department, on July 20th was in fact not mailed until July 25th. However, had that happened, there is no indication that that was any kind of an act of retaliation by Sandra McDonald, and even if it were, there is nothing that would have flowed from it to change the circumstance, so that if the notice was inadequate, and it was unfortunate, clearly, it doesn't amount to a retaliation.

As far as the denial of the leave applications, they do not constitute retaliation, unless it be assumed that the entire department is retaliating against her because of her discrimination complaint, but there is no evidence of a link between the discrimination complaint, no evidence of an intent to retaliate, and, as a matter of law, there has to be more than simply knowledge of the filing of a protected activity,

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the complaint, to make an adverse employment action

retaliatory. Were it otherwise, there could be no adverse action taken against anyone who had filed a complaint, and that nexus, that link, that causality has not been established by this record. So for that reason I conclude that the claims based on retaliation will be dismissed.

I suggest that the parties should submit a judgment notice. In addition, because I'm aware that this has been a trial of a week, and that there may be things which I have inadvertently misstated or not correctly characterized, I would suggest a schedule, whenever the parties want, by which time any motions to amend the findings and conclusions would be entertained. They are the findings and conclusions which I have reached today. But if the parties were to persuade me otherwise, I'd be very pleased to change them if I thought it was warranted.

That also leaves the question of the post '91 retaliation claims. I have already held that those have stated a cause in view of my conclusions today, and I am somewhat more dubious about that cause just on the question of time, but I don't preclude it. I think it would be appropriate for us to schedule a time when those claims can be heard by a jury or they could be made the subject of motion by the parties, if they felt that was appropriate. So the two things I would suggest, and they could be the same, it's the convenience of

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the parties that should control, a time to have, if you wish, an argument and presentation of papers, and an argument on any amendments of the findings and conclusions and a date for a trial on the remaining retaliation claims.

So you all want to address those issues or would you prefer to think about it and then address them or how do you want to handle it?

MS. SANK: Your Honor, I think I really feel that I want to definitely address it, but perhaps I think to be more conservative to say I would like to think about it.

THE COURT: All right. That's fine. Just as a control, you all can arrange anything you want that you can agree on. Given the past history, it's a little hard to get agreement I recognize.

Why don't we do this? Why don't we make any motions addressed to what I have determined on November 6th. That's a little more than a month. Let's have that as a control date. If you all want to change that date, it's fine, and have as a

control date for the trial on the remaining retaliation claims November 18th. If you ali want to change those dates, that's fine.

MR. BANK: Your Honor, just to clarify the motion for summary judgment, if any --

THE COURT: If you are going to make a motion for summary judgment, I think you should make it returnable on the

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6th. Anything else?

MS. SANK: Your Honor, is that independent of our motion to address the decision?

THE COURT: I think those things are independent, yes.

MS. SANK: Would they not be related?

THE COURT: I don't think they are necessarily related. No, I don't think so. Any motions, whether they are directed to the retaliation claim or directed to the findings and conclusions, will be returnable on the 6th unless the parties agree on another date. Anything else?

Thank you all.

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

DECIDED: October 7. 2002

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
DIANE SANK,

Plaintiff,

- against - 94 Civ. 0253 (RWS)

THE CITY UNIVERSITY OF NEW YORK, JOSEPH MURPHEY, et al., OPINION

Defendants.
----------X

APPEARANCES:

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[page 1]

Sweet, D.J.,

Defendants City University of New York ("CUNY") and City College of the City of New York ("CCNY") (collectively the "Defendants") have moved pursuant to Rule 56 of the Federal Rules of Civil Procedure to dismiss the

remaining claims in the complaint of plaintiff pro se Diane Sank ("Sank"). Sank's only remaining claims are filed pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), codified at 42 U.S.C. §§ 2000e et seq., alleging that defendants removed her as chairperson of the Anthropology Department based on her gender, race, religion, and age, and retaliated against her after she filed a complaint of discrimination with the New York City Human Rights Commission.

For the following reasons, the Defendants' motion is granted in part and denied in part.

Facts

The parties, proceedings, and facts have been described in greater detail in Sank v. CUNY, 2002 WL 523282 (April 5, 2002) (the "April 5 Opinion"), familiarity with which is presumed. Because Sank has not submitted a Rule 56.1 statement, the facts that were presented in the April 5 Opinion remain the same.

[page 2]

Prior Proceedings

Sank filed her complaint in this Court on January 18, 1994, and an amended complaint (the "Complaint") was filed on May 27, 1994. In a series of opinions, the complaint has been whittled down to the remaining Title VII claims. See Sank v. CUNY, No. 94 Civ. 0253, 1995 WL 314696 (S.D.N.Y. May 24, 1995) (pursuant to Fed. R. Civ. P. 12(b)(6) dismissing (1) plaintiff's claims of discrimination based on age, religion, and disability, (2) plaintiff's Title VII claims against individual defendant Beverly Sowande and the CUNY Board of Trustees, and (3) all of plaintiff's claims under 42 U.S.C. § 1983); Sank v. CUNY, 1997 WL 362150 (S.D.N.Y. June 26, 1997) (dismissing Title VII claims against all other individual defendants).

Defendants filed the instant motion on April 13, 2001 to dismiss all remaining claims. These claims were: (1) Title VII claims against CUNY and CCNY for gender and race discrimination and retaliation; (2) a state FOIL claim against defendant Sowande; and (3) a state contract law claim against CUNY and CCNY. In response, Sank on November 26, 2001 filed a declaration in support of a motion under Rule 56(f) to deny or postpone summary judgment. The motion was deemed fully submitted on February 27, 2002.

In the April 5 Opinion, the court dismissed Sank's state FOIL and contract law claims. The issue of whether summary

[page 3]

judgment should be granted on the Title VII claims was not reached, however, because it was determined that Sank had shown that she needed more discovery before responding to the motion.

A hearing was held on April 10, 2002, at which the Defendants emphatically stated that they had provided all the discovery required of them that they were capable of providing. An order issued on April 12, 2002, stating that Sank would be required to respond to CUNY's summary judgment motion if the Defendants provided a sworn affidavit affirming that they had duly complied with the required discovery. Sank v. CUNY, 2002 WL 548744 (S.D.N.Y. April 12, 2002).

The Defendants supplied the affidavit on May 13, 2002, thus reopening the portion of this motion seeking summary judgment on Sank's Title VII claims. Sank then submitted her opposition papers on June 12, 2002, and the motion was considered fully submitted at that time.

Discussion

I. Standard of Review[for Summary Judgment

Rule 56(e) of the Federal Rules of Civil Procedure provides that a court shall grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and

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admissions on file, together with affidavits . . . show that there is no genuine issue as to material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(e); Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Silver v. City Univ., 947 F.2d 1021, 1022 (2d Cir. 1991). "The party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists and that the undisputed facts establish her right to judgment as a matter of law." Rodriguez v. City of New York, 72 F.3d 1051, 1060-61 (2d Cir. 1995). In determining whether a genuine issue of material fact exists, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Gibbs-Alfano v. Burton, 281 F.3d 12, 18 (2d Cir. 2002).

"The salutory purposes of summary judgment -- avoiding protracted, expensive and harassing trials -- apply no less to discrimination cases than to commercial or other areas of litigation." Nicastro v. Runyon, 60 F. Supp.2d 181, 183 (S.D.N.Y. 1999) (citing Dister v. Continental Group, Inc., 859 F.2d 1108, 1114 (2d Cir. 1988)). Greater caution must be exercised, however, in granting summary judgment in employment discrimination cases where the employer's intent is genuinely in issue. Belfi v. Predergast, 191 F.3d 129, 135 (2d Cir. 1999). This is so because "[e]mployers are rarely so cooperative as to include a notation in the personnel file that the [action complained of] is for a reason expressly

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forbidden by law." Bickerstaff v. Vassar College, 196 F.3d 435, 448 (internal quotation marks and citation omitted; brackets in the original). But even where an employer's intent is at issue, "a plaintiff must provide more than conclusory

allegations of discrimination to defeat a motion for summary judgment." Schwapp v. Town of Avon, 118 F.3d 106, 110 (2d Cir. 1997); Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir. 1985).

In addressing the present motion, the Court is mindful that the plaintiff is proceeding pro se and that her submissions should be held "'to less stringent standards than formal pleadings drafted by lawyers . . . .'" Hughes v. Rowe, 449 U.S. 5, 9, 101 S.Ct. 173, 176 (1980) (per curiam) (quoting Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 595 (1972)); see also Ferran v. Town of Nassau, 11 F.3d 21, 22 (2d Cir. 1993). The Court recognizes that it must make reasonable allowances so that a pro se plaintiff does not forfeit rights by virtue of lack of legal training. Traguth v. Zuck, 710 F.2d 90, 94 (2d Cir. 1983).

Indeed, district courts should "read the pleadings of a pro se plaintiff liberally and interpret them to raise the strongest arguments they suggest.'" McPherson v. Coombe, 174 F.3d 276, 280 (2d Cir. 1999) (quoting Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994). Nevertheless, the Court is also aware that pro se status "'does not exempt a party from compliance with relevant

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rules of procedural and substantive law." Traguth, 710 F.2d at 95 (quotations omitted).

II. Title VII

As an initial matter, Sank's response to the Defendants' motion for summary judgment consists entirely of her argument for why she continues to need more discovery more than eight years after her complaint was originally filed. This argument was finally rejected in the April 12 Opinion. Sank's motion for reconsideration of that opinion has also been rejected. As a result, this Court will reach the merits in this opinion.

A. Discrimination Claim

Claims of discrimination under Title VII are analyzed under the three-part test announced in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). First, the plaintiff must establish a prima facie case of discrimination by showing that (1) she is a member of a protected class and (2) she suffered an adverse employment action (3) under circumstances that give rise to an inference of unlawful discrimination. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); Weinstock v. Columbia Univ., 224 F.3d 33, 42 (2d Cir. 2000). Second, if the plaintiff successfully establishes a prima facie case of discrimination, the defendant may rebut that showing by articulating a legitimate, non-

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discriminatory reason for the employment action. Burdine, 450 U.S. at 254; Weinstock, 224 F.3d at 42. Finally, if the defendant articulates a non-discriminatory reason, the plaintiff must come forward with evidence that the defendant's articulated non-discriminatory reason is a mere pretext for actual discrimination. Weinstock, 224 F.3d at 42 ("The plaintiff must 'produce not simply some evidence but sufficient evidence to support a rational finding that the legitimate non-discriminatory reasons proffered by the [defendant] were false and that more likely than not [discrimination] was the real reason for the'" employment action (quotations and citations omitted; brackets in original)). Whether a judgment as a matter of law is appropriate depends upon a number of factors, including the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 148-49 (2000).

1. Prima Facie Case

The Defendants argue that Sank cannot establish that her removal as chairperson of the Anthropology Department (the "Department") occurred under circumstances that would give rise to an inference of unlawful discrimination.

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However, several circumstances do at the very least present an disputed issue of fact as to whether discrimination may be inferred. CCNY President Bernard W. Harleston ("Harleston") had threatened to shut down the Department because it contained no black faculty. Second, Harleston then appointed a black male as interim chairman in Sank's place, even though two white female candidates had also been vetted. Further, the circumstances of that appointment were suspect: Harleston did not ask Sank to resign quietly, as she claims was the usual practice,*fn1 but instead publicly asked her to step down. Further, he did so without the advice and approval of the university's Ombudsman.

Reading Sank's complaint in the light most favorable to her, she has established a material issue of fact as to whether an inference of discrimination exists.

B. Defendants' Non-Discriminatory Reason

The Defendants state that Sank was removed because she had lost the support of her fellow faculty members and because, as the outside anthropologists noted, there was a need for outside guidance. This is sufficient to state a non-discriminatory reason.

---

1 Although the CUNY By-laws at that time permitted CCNY's president to remove a departmental chairperson "as the interests of the college may require" after conferring with members of the department, Sank claims that this incident was the first time in CCNY's history that a department chair was removed, rather than quietly asked to resign.

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C. Pretext

Sank argues that Harleston had a discriminatory agenda in that he wanted to make CCNY a black male-dominated institution.

The Defendants, however, point to the fact that Sank's removal was endorsed by four of the six faculty members of the Department and was recommended by impartial outside evaluators. They also note that the Department's eventual decision to elect a white female chairperson after an exhaustive search is indicative of the non-existence of any discriminatory agenda.

However, the facts detailed above call into doubt the excuses given by the Defendants. First, the Defendants' reliance on the fact that Sank's removal was endorsed by faculty members is drawn into doubt by the very public stance of the faculty members' boss, Harleston, that they might lose their Department (and thus potentially their jobs) if more black faculty were not hired in the Department. As a result, their vote might have been influenced by the alleged racist and sexist animus that Sank attributes to Harleston. Further, the fact that a white female was eventually selected also is drawn into question by the fact that the selection took time. Sank's immediate successor was a black male. Then, a white male was elected under dubious circumstances for the next term. In addition, Sank had already filed her complaint by the time the white chairwoman was elected. This circumstance alone presents an issue of disputed fact as to whether the Defendants

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specifically sought out a white chairwoman to rebut Sank's complaint.

As a result, Sank has presented a genuine issue of material fact, and the Defendant's motion to dismiss the Title VII discrimination claim is denied.

III. <u>Retaliation Claim</u>

A Title VII retaliation claim is also analyzed under the rubric of McDonnell Douglas. Tomka v. Seiler Corp., 66 F.3d 1295, 1308 (2d Cir. 1995). First, in order to make out a prima facie case of retaliation, a plaintiff must establish (1) participation in a protected activity known to the defendant; (2) an employment action disadvantaging the plaintiff; and (3) a causal connection between the protected activity and the adverse employment action. Quinn v. Green Tea Credit Corp., 159 F.3d 759, 768-69 (2d Cir. 1998). Second, if the plaintiff establishes a prima facie case of retaliation, the defendant may articulate a legitimate, non-retaliatory reason for its actions. Id. at 768. Finally, if the defendant does so, the plaintiff must prove that the proffered reason is merely a pretext for retaliation. Id. at 769.

The Defendants here challenge whether Sank has made her prima facie case. They argue that Sank did not suffer an adverse employment action and that the alleged adverse actions were not

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causally connected to the filing of her complaint with the Commission.

Adverse employment actions include "discharge, refusal to hire, refusal to promote, demotion, reduction in pay, and reprimand." Morris v. Lindau, 196 F.3d 102, 110 (2d Cir. 1999) (citations omitted). The Second Circuit has also held that lesser actions may qualify, but has not provided a bright-line rule with regard to such lesser actions. Id. In Bernheim v. Litt, 79 F.3d 318, 327 (2d Cir. 1996), the Second Circuit has found in the case of plaintiff teacher such lesser actions to include negative evaluation letters, express accusations of lying, assignment of lunchroom duty, reduction of class preparation periods, failure to process the teacher's insurance forms, transfer from library to classroom teaching, and assignment to a classroom on the fifth floor which aggravated the teacher's disabilities. Id. However, "[b]ecause there are no bright line rules as to which employment actions meet the

threshold for 'adverse,' courts must make this determination on a case-by-case basis." Wilburn v. Fleet Fin. Group, Inc., 170 F. Supp.2d 219, 237 (D. Conn. 2001) (quoting Richardson v. New York State Dep't of Correctional Servs., 180 F.3d 426, 446 (2d Cir. 1999)).

To sustain an adverse employment action, a plaintiff must "endure a 'materially adverse change' in the terms and conditions of employment.'" Galabya v. New York City Bd. of Educ., 202 F.3d

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636, 640 (2d Cir. 2000) (quoting Richardson, 180 F.3d at 446). In order for the action to be "'materially adverse,' a change in working conditions must be 'more disruptive than a mere inconvenience or an alteration of job responsibilities.'" Id. (quoting Crady v. Liberty Nat'l Bank and Trust Co. of Indiana, 993 F.2d 132, 136 (7th Cir. 1993)). A "'material adverse change' is one that 'has an attendant negative result, a deprivation of a position or an opportunity.'" Campbell v. Grayline Air Shuttle, Inc., 930 F. Supp. 794, 802 (E.D.N.Y. 1996) (citing Medwid v. Baker, 752 F. Supp. 125, 136-37 (S.D.N.Y. 1990)). While adverse employment actions extend beyond readily quantifiable losses, "not everything that makes an employee unhappy is an actionable adverse action." Phillips v. Bowen, 278 F.3d 103, 117 (2d Cir. 2002) (stating that employee's "trivial complaints about an unpleasant working environment" do not constitute adverse employment actions).

In her complaint, Sank alleges that she experienced two adverse employment actions: (1) alleged threats by her colleagues in the Department to take away her research computer; and (2) the dismantling of her research laboratory.

As the Defendants point out, the research computer was never, in fact, taken. Sank was not thereby deprived of a position or an opportunity. Further, she has failed to allege how the threats rose to a "sufficiently severe" level that could

reasonably be claimed to constitute a change in Sank's conditions and terms of

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employment. Richardson, 180 F.3d at 446 (unchecked retaliatory co-worker harassment may constitute adverse employment action if sufficiently severe); Gallo v. Herman, No. 97 Civ. 8359, 1999 WL 249709, at *3 (S.D.N.Y. April 28, 1999) (derision from co-workers insufficient to establish adverse employment action in absence of specific facts showing nature of derision or how it rises to a materially adverse change), aff'd 205 F.3d 1322 (2d Cir. 2000). Sank's retaliation claim is dismissed with regard to this allegation.

With regard to the taking of her laboratory, the Defendants note that Sank could have been assigned a new laboratory if she had wanted one and assisted in its restoration. Yet Sank refused to participate in the process of readying a new room that had been assigned as her laboratory as a result of campus-wide renovations. Therefore, the Defendants conclude that Sank cannot complain that her laboratory space was "taken" or that she was deprived of a position or opportunity.

Sank can complain, however, that her laboratory space was relocated without her oversight and without her knowledge. While the plan to relocate her laboratory was announced on July 13, 1989, and was scheduled to take place on July 23 and 24, the Department Chairman did not inform Sank of this fact until a week after the announcement, by letter dated July 20, 1989. July 20 was a Thursday, and the move was set to begin on a Sunday. Therefore,

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the letter would have had to reach Sank by Saturday in order for her to be aware of the relocation. Given the small likelihood of Sank receiving the notice in time, the Department Chairman's actions virtually guaranteed that Sank's laboratory -- which included personal effects and items Sank considered valuable and irreplaceable -- would be moved

without her presence and knowledge. This invasion of Sank's personal and professional space is an adverse employment action.

The Defendants also argue that Sank has failed to show a causal connection between the relocation and her complaint. The Defendants are correct that the actual decision to move the laboratory was made by the architect in charge of the campus-wide renovations, Anthony Rodriguez ("Rodriguez"). Further, Rodriguez claims that he did not know Sank and was unaware of her complaint. As noted above, however, the adverse action was the failure to inform Sank of the move in time for her to oversee it. The person directly responsible for that was the Department Chairman, who was well aware of Sank's complaint. Given the timing, the situation raises a material issue of fact as to whether there was a causal connection between the lack of notice and Sank's filing of her complaint. Therefore, the Defendants' motion to dismiss Sank's retaliation claim on these grounds is denied.

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Conclusion

The Defendants' motion is denied except as to Sank's Title VII retaliation claim based on the threats to take away her computer, which is dismissed.

The parties are directed to attend a pretrial conference on September 10, 2002, at which time a trial date will be set.

It is so ordered.

New York, NY
July 31, 2002

/s/ Robert W. Sweet
ROBERT W. SWEET
U.S.D.J.

FILED: August 2, 2002
CITATION: *Sank v. City Univ. of N.Y.*, 219 F. Supp. 2d 497 LEXIS 14034 (S.D.N.Y. 8/2/2002)

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
DIANE SANK,

Plaintiff,

- against - 94 Civ. 0253 (RWS)

THE CITY UNIVERSITY OF NEW YORK, JOSEPH MURPHEY, et al., OPINION

Defendants.
----------X

APPEARANCES:

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[page 1]

Sweet, D.J.,

Plaintiff pro se Diane Sank ("Sank") has moved pursuant to Local Rule 6.3 of the Southern District of New York ("Local Rule 6.3") for this Court to reconsider (1) those portions of its Opinion dated April 5, 2002 dismissing Sank's

claims for monetary relief and her request for trial by jury; and (2) the portion of its Order dated April 12, 2002 that denied Sank's request for additional time for discovery.

For the following reasons, Sank's motion is granted in part and denied in part.

Facts

The parties, proceedings, and facts have been described in greater detail in Sank v. CUNY, 2002 WL 523282 (April 5, 2002) (the "April 5 Opinion"), familiarity with which is presumed.

Prior Proceedings

Sank filed her complaint in this Court on January 18, 1994, and an amended complaint (the "Complaint") was filed on May 27, 1994. In a series of opinions, the complaint has been whittled down to the remaining Title VII claims. See Sank v. CUNY, No. 94 Civ. 0253, 1995 WL 314696 (S.D.N.Y. May 24, 1995) (pursuant to Fed.

[page 2]

R. Civ. P. 12(b)(6) dismissing (1) plaintiff's claims of discrimination based on age, religion, and disability, (2) plaintiff's Title VII claims against individual defendant Beverly Sowande and the CUNY Board of Trustees, and (3) all of plaintiff's claims under 42 U.S.C. § 1983); Sank v. CUNY, 1997 WL 362150 (S.D.N.Y. June 26, 1997) (dismissing Title VII claims against all other individual defendants).

In the April 5 Opinion, the Court dismissed Sank's state FOIL and contract law claims, as well as ruled that Sank was not entitled to a jury trial or to damages because she did not complain of any actions occurring after the effective date of the Civil Rights Act of 1991, which provided for a jury trial and damages to Title VII claimants. The issue of whether

summary judgment should be granted on the Title VII claims was not reached, however, because it was determined that Sank had shown that she needed more discovery before responding to the motion.

A hearing was held on April 10, 2002, to discuss what further discovery, if any, should be granted. An opinion issued on April 12, 2002, stating that Sank would be required to respond to CUNY's summary judgment motion on her Title VII claims if the defendants provided a sworn affidavit affirming that they had duly complied with the required discovery. Sank v. CUNY, 2002 WL 548744 (S.D.N.Y. April 12, 2002).

[page 3]

Sank contests portions of both the April 5 Opinion and the April 12 Order.

Sank's Contentions

In determining in the April 5 Opinion that Sank was not entitled to a jury trial or damages because no events occurred after 1990, the Court relied on the defendants' papers and statements of facts, as well as Sank's complaint and prior opinions. Sank did not submit opposition papers or a Rule 56.1 statement. Instead, Sank only submitted a motion pursuant to Rule 56(f) of the Federal Rules of Civil Procedure seeking more discovery.

In her motion to reconsider, Sank has provided additional facts that she did not provide in opposition to the defendant's motion for summary judgment. She alleges that contrary to the statement in the April 5 Opinion, the following adverse actions occurred after 1990 in retaliation for filing her claim of discrimination with the New York City Human Rights Commission (the "Commission") and were a part of the record:

- Denial of Sank's request for a one-semester leave (sabbatical) in 1991;

- Denial of Sank's request for a one-semester leave in 1992;

- Attempts by President Harleston to fire Sank in 1995 by "retrenching" the Anthropology Department (the "Department"); of the six professors in the Department, only Sank was not secretly promised to be reassigned to other departments and thus only she would have been fired in the retrenching; and

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- Deliberate errors in the Fall 2001 course schedule that erroneously stated that there were three mathematics and economics prerequisites for Sank's anthropology class when there were none. Sank requested that the errors be corrected from May 2001 to August 2001, and nothing was done until five days before the close of registration. As a result, Sank's course was substantially undersubscribed, giving the Defendants a pretext to cancel it. The Defendants also canceled the class four days prior to close of registration (a mere one day after correcting the mistake regarding the prerequisites), even though two to three other underenrolled Anthropology electives were left open for enrollment during the first week of classes.

Sank also states that she has "suffered continuously . . . the deleterious stigma and embarrassment of having been removed as Chairperson and having the Administration dismantle and take away" her laboratory. Pl.'s Mot. at 5.

Discussion

In addressing the present motion, the Court is mindful that the plaintiff is proceeding pro se and that her submissions should be held "'to less stringent standards than formal pleadings drafted by lawyers . . . .'" Hughes v. Rowe, 449 U.S. 5, 9, 101 S. Ct. 173, 176 (1980) (per curiam) (quoting Haines

v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 595 (1972)); see also Ferran v. Town of Nassau, 11 F.3d 21, 22 (2d Cir. 1993). The Court recognizes that it must make reasonable allowances so that a pro se plaintiff

[page 5]

does not forfeit rights by virtue of lack of legal training. Traguth v. Zuck, 710 F.2d 90, 94 (2d Cir. 1983).

Indeed, district courts should "read the pleadings of a pro se plaintiff liberally and interpret them to raise the strongest arguments they suggest.'" McPherson v. Coombe, 174 F.3d 276, 280 (2d Cir. 1999) (quoting Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994). Nevertheless, the Court is also aware that pro se status "'does not exempt a party from compliance with relevant rules of procedural and substantive law." Traguth, 710 F.2d at 95 (quotations omitted).

I. Standards Under Local Rule 6.3

"To succeed on a motion for reargument, the moving party must demonstrate that the court overlooked the controlling decisions or factual matters that were placed before the court in the underlying motion." Lopez v. Comm'r of Soc. Sec., 2002 U.S. Dist. LEXIS 5091, *1-*2 (S.D.N.Y. March 27, 2002) (quotations and citations omitted); see also Shrader v. CSX Transp., 70 F.3d 255, 257 (2d Cir. 1995) (motion for reargument "will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked -- matters, in other words, that might reasonably be expected to alter the conclusion reached by the court").

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Rule 6.3 is intended to "ensure the finality of decisions and to prevent the practice of a losing party examining a decision and then plugging the gaps of a lost motion with additional matters." Carolco Pictures, Inc. v. Sirota, 700 F. Supp. 169, 170 (S.D.N.Y. 1988) (citation omitted). The parties may not present new facts or theories at this stage. Ralph

Oldsmobile Inc. v. General Motors Corp., 2001 WL 55729, at *2 (S.D.N.Y. Jan. 23, 2001) (striking affidavit that was filed in support of motion to reconsider without court's permission); Primavera Familienstifung v. Askin, 137 F. Supp.2d 438, 442 (S.D.N.Y. 2001) (party may not "advance new facts, issues or arguments not previously presented to the Court") (quoting Morse/Diesel Inc. v. Fidelity & Deposit Co. of Md., 768 F. Supp. 115, 116 (S.D.N.Y. 1991).

Rule 6.3 must be narrowly construed and strictly applied so as to avoid duplicative rulings on previously considered issues, and may not be employed as a substitute for appealing a final judgment. Lopez, 2002 U.S. Dist. LEXIS 5091, at *3; Shamis v. Ambassador Factors, 187 F.R.D. 148, 151 (S.D.N.Y. 1999). The decision to grant or deny the motion rests in the discretion of the district court. AT&T;Corp. v. Community Network Servs. Inc., 2000 WL 1174992, at *1 (S.D.N.Y. Aug. 18, 2000).

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II. April 5, 2002 Opinion

As an initial matter, defendants correctly point out that Sank relies entirely on factual allegations that were not submitted as part of or in opposition to the motion for summary for judgment to support her motion for reconsideration of the April 5 Opinion. A motion to reconsider "is limited to the record that was before the Court on the original motion." Frankel v. ICD Holdings, S.A., 939 F. Supp. 1124, 1126 (S.D.N.Y. 1996) (refusing to consider affidavits not submitted as part of underlying summary judgment motion on motion for reargument).

However, courts may consider the entire record before it, in addition to papers submitted on summary judgment. 28 Fed. Proc., L. Ed. § 62:590; see also In re Baumbilt, 229 B.R. 50, 59 (Bankr. E.D.N.Y. 1999) ("Rule 56 permits a court to consider the entire record and does not limit a court's review to that portion highlighted by the motion.").

Sank points out in her reply memorandum that the allegations above -- among others -- were made part of the record, beginning as early as 1996. Therefore, they are not "new" facts and may be considered for the purposes of Local Rule 6.3.

The April 5 Opinion held that Sank had failed to allege any actions occurring after the effective date of the Civil Rights

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Act of 1991 and therefore was not entitled to a jury trial and damages. The addition of these facts show that Sank has alleged that some retaliatory actions occurred after the effective date of the Civil Rights Act. As a result, Sank is entitled to a jury trial and damages on at least a portion of her retaliation claims.

Sank appears to suggest, however, that she should be entitled to a jury trial on the entirety of her retaliation claim, even though some retaliatory acts took place prior to the effective date of the Civil Rights Act, because the actions constitute a "continuing violation."

he Second Circuit has not addressed the issue of whether a party may seek retroactive application of the Civil Rights Act of 1991, which has been held not to apply retroactively, if she alleges a continuing violation that straddles the effective date. Other circuits that had addressed the issue are split. Place v. Abbott Laboratories, 215 F.3d 803, 807 (7th Cir. 2000) (discussing circuit split). The Court of Appeals for the District of Columbia and the Eight Circuit Court of Appeals have rejected this notion. Tomasello v. Rubin, 167 F.3d 612, 620 (D.C. Cir. 1999) ("an award of compensatory damages for preenactment conduct would have an impermissible effect"); Caviness v. Nucor-Yamato Steel Co., 105 F.3d 1216, 1220 n. 1 (8th Cir. 1997) ("We are not familiar with any Eighth Circuit law where the concept of

continuing violation, ordinarily associated with statutes of limitations issues, has been

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employed to overcome a non-retroactivity rule"). The Seventh Circuit has refrained from deciding the issue despite suggestive language from prior opinions. Place, 215 F.3d at 807 (citing Taylor v. Western and S. Life Ins. Co., 966 F.2d 1188, 1196 (7th Cir. 1992) (continuing violation theory "is utilized only in the context of a challenge to the timeliness of a cause of action"), but finding that "[r]esolving this nettlesome legal issue is unnecessary to resolving this appeal"). The First Circuit allows the theory. DeNovellis v. Shalala, 124 F.3d 298, 307 n. 4 (1st Cir. 1997) ("a continuing violation theory could be applied to any time requirement imposed by Title VII, whether it be the effective date of an amending statute, as here, or a statute of limitations"). District courts in the Southern District of New York have rejected the theory. E.g., Peele v. New York City Dep't of Social Servs./Human Resources Admin., 1995 WL 110085, at *4 (S.D.N.Y. March 14, 1995) (rejecting continuing violation theory and holding that right to jury trial applies only for post-enactment claims); Tillman v. St. Vincent's Hosp. and Medical Center of New York, 1993 WL 426882, at *3 (S.D.N.Y. Oct. 18, 1993) (rejecting use of continuing violation theory to recover for acts which, when performed by St. Vincent's employees, were not forbidden by that law as inconsistent with ruling that statute did not apply retroactively).

This Court agrees with the weight of authority. Even if Sank could demonstrate that the acts she complains of constitute a "continuing violation" she may only have a jury trial and damages

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on the events detailed above that occurred after the effective date of the Civil Rights Act.

The defendants argue that Sank's motion for reconsideration should not be granted because the acts complained of are not adverse acts and should be dismissed.

Adverse employment actions include "discharge, refusal to hire, refusal to promote, demotion, reduction in pay, and reprimand." Morris v. Lindau, 196 F.3d 102, 110 (2d Cir. 1999) (citations omitted). The Second Circuit has also held that lesser actions may qualify, but has not provided a bright-line rule with regard to such lesser actions. Id. In Bernheim v. Litt, 79 F.3d 318, 327 (2d Cir. 1996), the Second Circuit has found in the case of a plaintiff teacher such lesser actions to include negative evaluation letters, express accusations of lying, assignment of lunchroom duty, reduction of class preparation periods, failure to process the teacher's insurance forms, transfer from library to classroom teaching, and assignment to a classroom on the fifth floor which aggravated the teacher's disabilities. Id. However, "[b]ecause there are no bright line rules as to which employment actions meet the threshold for 'adverse,' courts must make this determination on a case-by-case basis." Wilburn v. Fleet Fin. Group, Inc., 170 F. Supp.2d 219, 237 (D. Conn. 2001) (quoting Richardson v. New York State Dep't of Correctional Servs., 180 F.3d 426, 446 (2d Cir. 1999)).

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To sustain an adverse employment action, a plaintiff must "endure a 'materially adverse change' in the terms and conditions of employment.'" Galabya v. New York City Bd. of Educ., 202 F.3d 636, 640 (2d Cir. 2000) (quoting Richardson 180 F.3d at 446). In order for the action to be "'materially adverse,' a change in working conditions must be 'more disruptive than a mere inconvenience or an alteration of job responsibilities.'" Id. (quoting Crady v. Liberty Nat'l Bank and Trust Co. of Indiana, 993 F.2d 132, 136 (7th Cir. 1993)). A "'material adverse change' is one that 'has an attendant negative result, a deprivation of a position or an opportunity.'" Campbell v. Grayline Air Shuttle, Inc., 930 F. Supp. 794, 802 (E.D.N.Y. 1996) (citing Medwid v. Baker, 752 F. Supp. 125,

136-37 (S.D.N.Y. 1990)). While adverse employment actions extend beyond readily quantifiable losses, "not everything that makes an employee unhappy is an actionable adverse action." Phillips v. Bowen, 278 F.3d 103, 117 (2d Cir. 2002) (stating that employee's "trivial complaints about an unpleasant working environment" do not constitute adverse employment actions).

Sank has asserted several adverse actions in her motion for reconsideration of the Court's April 5 Opinion. The defendants specifically address the following: (1) the denial of a half-year, full-pay sabbatical in 1991 and 1992; (2) the aborted attempt to retrench the Department in 1995; and (3) mistakes in the course

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catalog in 2001.[1] The defendants argue that none of these actions rise to the level of an adverse employment action.

The defendants appear to liken Sank's denial of sabbatical to a case where the fact that an employee was denied vacation time was held not to be an adverse employment action. Boyd v. Presbyterian Hosp. in City of New York, 160 F. Supp.2d 522, 537-38 (S.D.N.Y. 2001). Sank is persuasive in arguing, however, that a sabbatical is a central, longstanding and essential aspect of academic life. Moreover, Sank was denied such a sabbatical after 22 years without one and in express violation of the terms of a collective bargaining agreement. As a result, Sank was supposed to have received "special consideration," and she did not.

The defendants further argue that Sank could have received a different type of sabbatical -- a full-year, half-pay sabbatical -- than the half-year full-pay sabbatical that she requested. Further, during the relevant time, only three one-semester full-pay sabbaticals were given out, as opposed to thirty full-year half-pay sabbaticals. While this may be the case, Sank raises a material issue of fact by pointing out that at

the same time that she was denied the half-year full-pay sabbatical, one was awarded to a male, John Harbeson ("Harbeson"), even though he had

[1] Sank discusses more than the four instances listed above in her reply memorandum in support of her motion for reconsideration. The additional instances will not be discussed as the defendants did not challenge them.

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not met what Sank claims was a minimum six-year employment requirement.[2] Moreover, Harbeson was the head of the Faculty Senate committee that had investigated the taking of Sank's laboratory in July 1989 and eventually exonerated the institution. Sank claims that Harbeson refused to consider Sank's charge that the laboratory had been taken from her in retaliation for her protesting and complaining of discrimination, and Harbeson also lost key evidence such as tape recordings of meetings with key administrators. This is sufficient to raise an issue of fact.

With regard to the "retrenching" of the Department, Sank argues that it "was nothing more than a subterfuge for eliminating Plaintiff" and that all the members of the Department except for her were secretly promised transfers to other posts. Further, the action had to be rescinded entirely after the Faculty Senate became aware of the plan. However, Sank was not actually terminated, nor was the Department "retrenched." This therefore does not constitute an adverse employment action as no such action was consummated.

Finally, defendants fail to persuade that the mistakes in the 2001 course catalogue were more of an "inconvenience" than an adverse employment action. First, the circumstances under which the mistake occurred (and was allowed to occur) raise a material

[2] CUNY's Board of Trustees eventually overruled the award of the sabbatical to Harbeson.

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issue of fact. Sank sought to get the defendants to correct the mistake in the course catalog for months and was unsuccessful until a few days prior to the end of registration. Then the defendants cancelled the course, while several other low-enrolled courses in the Department remained open for registration. As a result of the underenrollment, Sank claims that the defendants disparaged her and made it a matter of record that not enough students had been attracted to one of her courses. Further, she had to add on an additional class to her spring semester to make up for the one that was cancelled. The confluence of these facts raise a material issue of fact as to whether the mistakes in the 2001 course catalog were an adverse employment action.

The April 5 Opinion is modified to state that Sank is not entitled to a jury trial or damages on events occurring prior to the effective date of the Act but is entitled to a jury trial and damages on any retaliatory actions occurring after that date.

III. April 12 Order

In her motion for reconsideration, Sank seeks to overturn the April 12, 2002 Order and to enjoy untrammeled discovery: the "Defendants should finally be compelled to identify all the relevant personnel from among both their Faculty and Administration ranks, and then identify the race and gender of each, as well as each's full employment history." Pl.'s Mem. of Law at 13.

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Further, she suggests that the case be referred to a magistrate judge who can closely supervise the discovery process.

Because Local Rule 6.3 is to be narrowly construed to avoid repetitive arguments on issues that have been considered fully before the Court, motions for reargument should be denied where the movant simply repeats arguments made earlier. Stoner v. New York Ballet Corp., 2002 U.S. Dist. LEXIS 5921, at *8 (S.D.N.Y. April 8, 2002) (denying motion

for reargument where movant simply "rehashes the arguments he made" earlier); Hamilton v. Garlock, 115 F. Supp.2d 437, 439 (S.D.N.Y. 2000) (denying motion for reargument where movant failed to identify authority that was overlooked by the Court, but simply reiterates arguments that were previously considered and rejected).

Sank has utilized the same arguments that she most recently made and which were rejected at the hearing on April 10, 2002. Sank continues to argue that CUNY has failed to produce the requested records that indicate employee race and gender information. The April 12, 2002 Order specifically acknowledged Sank's claim that she has "still not receiv[ed] what she feels she needs to make her case," but ultimately determined, upon the submission of an affidavit by CUNY, that the defendants had in fact complied with her requests to the best of their abilities. Moreover, Sank's efforts to expand discovery to a seemingly boundless extent in the eight-year-old lawsuit were rejected: "This lawsuit has stretched

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for almost eight years, and it is time to end discovery, continue on to summary judgment and, if warranted, a trial on the merits." April 12, 2002 Order, at 9.

Sank points out that she has presented "controlling authority" to the contrary, as the April 5 Opinion and April 12 Order appear to be contradictory. It is true, as Sank points out, that the April 5 Opinion dismissed the defendants' summary judgment motion with regard to her Title VII claim. However, the Court treated the defendants' arguments at the April 10 hearing as an effective request to reopen the summary judgment motion, given their representations about the discovery that they had produced. Furthermore, based upon the representations of the parties at the hearing, the April 12 Order granted the defendants' request to reopen the summary judgment motion with regard to the Title VII claim if they affirmed that they had indeed produced all the discovery they were able to.

Sank presents no facts or controlling case law that would merit granting her motion for reconsideration of the April 12 Order pursuant to Local Rule 6.3.

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Conclusion

For the foregoing reasons, Sank's motion for reconsideration is granted in part and denied in part.

It is so ordered.

New York, NY
July 31, 2002

/s/ Robert W. Sweet
ROBERT W. SWEET
U.S.D.J.

FILED: August 2, 2002
CITATION: *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), LEXIS 14032 (S.D.N.Y. 8/2/2002)

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
DIANE SANK,

Plaintiff,

- against -

OPINION

THE CITY UNIVERSITY OF NEW YORK, et al.,(RWS)

94 Civ. 0253

Defendants.
----------X

APPEARANCES:

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Sweet, D. J.

By order dated April 5, 2002, this Court granted in part the motion of pro se plaintiff Diane Sank ("Sank") pursuant to Rule 56(f) of the Federal Rules of Civil Procedure and postponed the decision of a summary judgment motion filed by defendants City University of New York ("CUNY"), City

College of the City of New York ("CCNY") and Beverly Sowande ("Sowande") until Sank was able to complete necessary discovery.

Sank has filed this action pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), codified at 42 U.S.C. §§ 2000e et seq., alleging that defendants removed her as chairperson of the Anthropology Department based on her gender, race, religion, and age, and retaliated against her after she filed a complaint of discrimination with the New York City Human Rights Commission. Sank also alleges a violation of New York's Freedom of Information Law ("FOIL"), N.Y. Pub. Officers L. § 84 et seq., and breach of contract.

The April 5, 2002 order dismissed Sank's breach of contract claim and dismissed her FOIL claim inasmuch as she was seeking relief other than prospective injunctive relief. The Court declined to rule on the defendants' summary judgment motion with regard to the Title VII claim, however, as it was unclear from the

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pleadings and earlier argument that Sank had received all the discovery necessary to oppose the motion.

For the purposes of determining what discovery remained to be produced, a pretrial conference was held on April 10, 2002. Both defendants and Sank expressed frustration -- the defendants at having to produce more information than they have already produced over the span of this eight-year-old case, and Sank at still not receiving what she feels she needs to make her case.

The discovery already produced is instructive. Michael D. Solomon, the Associate General Counsel for Faculty, Staff and Student Relations in the Office of General Counsel and Vice Chancellor for Legal Affairs at CUNY ("Solomon"), has overseen Sank's document discovery against CUNY and CCNY in this lawsuit. He submitted an affidavit dated

December 20, 2001, detailing the documents produced to Sank. The following comes from this affidavit.

By order of the Court dated October 4, 2001, Sank (and her son, Brian Firschein) was given until December 4, 2001, to access the personnel records of current and past CCNY employees for the limited purpose of reviewing, copying, or recording information pertaining to an "employee's hiring date, separation date, race, gender, and current (or last known) address."

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Through December 4, 2001, Sank submitted eight separate requests with lists of names, totaling approximately 457 names, as follows: November 4, 2001, 78 names; November 6, 2001, 58 names; November 8, 2001, 171 names; November 13, 2001, 48 names; November 26, 2001, 4 names; November 27, 2001, 41 names; November 28, 2001, 42 names; and November 30, 2001, 15 names. Sank obtained these names by reading through the minutes from Board of Trustees' meetings during the relevant time period. The minutes document the names (without other requested information, such as race and gender) of persons seeking and receiving distinguished professorships, leave, and administrative positions.

CCNY compiled, organized and alphabetized the eight separate lists into a master list. After removing 160 duplicate names, CCNY arrived at a list of 297 names.

Five CCNY employees worked on locating and compiling the requested information on the 297 names. Records are kept in three separate rooms, and the employees searched in each room's records for the requested information. The three rooms contain, respectively, active employees' files, former employees' files, and payroll cards. If no payroll card is found, CCNY alleges that the files are either lost, cannot be located, or the individual was not an employee of CCNY (but may have been employed at another CUNY unit). All the

information was set to be provided to Sank by January 11, 2002.

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Sank complained in her Rule 56(f) motion that she was not provided with the race and sex of all of the 297 names she had requested information about.

The defendants can only produce what they have in their possession, and they stated at the April 10, 2002 conference that they had given Sank all the information they could locate on the 297 names. Solomon stated in his affidavit that race and sex information is not consistently maintained in the personnel records, even though there is a space for it on at least one form.[1] Because that affidavit and another by defense counsel Steven L. Banks were dated December 20 and 21, 2001, a few weeks before defendants planned to produce all remaining documents to Sank, the defendants should submit an additional affidavit stating that they have produced to Sank all the information she requested about the list of 297 names, or that there are no such records that reveal it.

At the April 10, 2002 conference, Sank also requested the same information about four categories of individuals, as well as for approximately 700 names about which she had previously not requested information. The 700 names presumably come from the Board of Trustee minutes, but were not submitted to the defendants

[1] Solomon also stated that Sank had in fact been provided with race and sex information through the City University Personnel System, which is a computer file. Because Sank still states that she has not received all such information, the computer system presumably also does not contain the required information.

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before the discovery cut-off date of December 4, 2001. It is unclear how many duplicates would exist among the four categories, the 700 names, and the 297 names that have already been produced in part. Given the 160 duplicates in

Sank's most recent eight lists of names, there are certain to be some. While mindful of the fact that Sank is proceeding pro se, this request cannot be granted.

The end of discovery was set for December 4, 2001. Sank failed to supply the defendants with the 700 additional names by that time. This lawsuit has stretched for almost eight years, and it is time to end discovery, continue on to summary judgment and, if warranted, a trial on the merits.

Conclusion

Defendants will produce to Sank within thirty (30) days of this opinion any required information on the 297 names they have not yet supplied and an affidavit to the effect that they have supplied to Sank all the required information on the 297 names. If the defendants have not supplied and cannot supply all the required information on any of the 297 names, they should instead produce an affidavit stating (1) that they have supplied all the required information for each of the 297 names not discussed in the affidavit, and (2) for each of the remaining names, a statement to the effect that they do not have the information or cannot reasonably locate it.

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Upon receipt of the affidavits and information, Sank will have thirty (30) days to respond to the defendant's motion for summary judgment with respect to her Title VII claim. At that time, the Court will consider the defendant's summary judgment motion on submission.

It is so ordered.

New York, NY
April 12, 2002

/s/ Robert W. Sweet
ROBERT W. SWEET
U.S.D.J.

FILED: April 15, 2002
CITATION: *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), LEXIS 6253 (S.D.N.Y. 4/15/2002)